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91-1927

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

TEXAS WATER CONSERVATION ASSOCIATION,
Petitioner
and
SABINE RIVER AUTHORITY

v.

U.S. DEPARTMENT OF INTERIOR, ET AL.
and

THE SIERRA CLUB AND THE NATIONAL AUDUBON SOCIETY, Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. BOOTH *
FRANK R. BOOTH
CAROLYN AHRENS
DAVIDSON, TROILO & BOOTH, P.C.
1900 First City Centre
816 Congress Avenue
Austin, Texas 78701
(512) 478-9506
Counsel for Petitioner
Texas Water Conservation Association

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Appendix B- Statutes and Regulations
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Austin, Texas 78701
(512) 478-9506
Counsel for Petitioner
Texas Water Conservation Association

Appendix A - DECISIONS FROM THE COURTS BELOW AND CLUB EASEMENT FINDING OF NO SIGNIFICANT IMPACT

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Plaintiff-Appellant,
and
Texas Water Conservation Association,
Plaintiff-Intervenor-Appellant,
v.
U.S. DEPARTMENT OF INTERIOR et al.,
Defendants-Appellees.
and
The Sierra Club and the National Audubon Society, Defendants-Intervenors-Appellees.

No. 90-4761.

United States Court of Appeals,
Fifth Circuit.

Jan. 28, 1992.

Rehearing Denied March 4, 1992.

Action was brought challenging the Fish and Wildlife Service's compliance with the National Environmental Policy Act (NEPA) in connection with proposed acquisition of conservation easement on wetlands habitat. On cross motions for summary judgment, the United States District Court for the Eastern District of Texas, Paul N. Brown, J., 745 F.Supp. 388, dismissed plaintiffs'

APPENDIX A
5th Circuit Court
January 28, 1992

claims, and plaintiffs appealed. The Court of Appeals, Goldberg, Circuit Judge, held that: (1) river authority and conservation association that wanted wetlands area for construction of reservoir suffered sufficient "injury in fact" from grant of nondevelopment easement to have standing to challenge acquisition of easement based on Service's failure to prepare environmental impact statement (EIS), but (2) actions of the Service in acquiring nondevelopment easement which prohibited any change in status quo did not amount to "major federal action significantly affecting quality of human environment" so as to mandate preparation of EIS.

AFFIRMED.

William H. Burchett, Christine C. Ryan, Jorden Schulte & Burchette, Washington, D.C., Earl Roberts, Jr., Roberts, Hill &

Calk, Longview, Tex., for Sabine River Authority.

Michael J. Booth, Frank R. Booth, Booth & Newsom, Austin, Tex., Ruth H. Yeager, First Asst. U.S. Atty., Tyler, Tex., Lisa Hemmer, Atty., Robert L. Klarquist, Dept. of Justice, Appellate Section, Environmental Natural Resources, Washington, D.C., for Texas Water Conservation Ass'n.

Jos. Irion Worsham, Worsham, Forsythe, Samples & Wooldridge, Dallas, Tex., for Little Sandy Hunting & Fishing Club.

Robert G. Dreher, Sierra Club Legal Def. Fund, Washington, D.C., for Sierra Club and Nat. Audubon Society.

Appeals from the United States District Court for the Eastern District of Texas.

Before GOLDBERG and GARWOOD, Circuit Judges, and BUCHMEYER,* District Judge:

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*District Judge for the Northern District of Texas, sitting by designation.

GOLDBERG, Circuit Judge:

This case is for the birds-thousands of them. And we mean that in no facetious sense.

At issue is a non-development easement on 3800 acres of land in East Texas, containing high-quality wetlands and wildlife habitat essential to migratory waterfowl. The Little Sandy Hunting and Fishing Club donated the easement to the U.S. Fish and Wildlife Service in an effort to guarantee that the wetlands would be preserved in their pristine state without the corrupting effect of commercial, agricultural, and industrial development. By accepting the easement, the Fish and Wildlife Service has thus insured that migratory birds and other wildlife can flourish there.

The Sabine River Authority and the Texas Water Conservation Association, though not unsympathetic to the plight (and flight) of

our fine feathered friends, filed a lawsuit alleging that the Fish and Wildlife Service violated the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq.*, by failing to prepare an Environmental Impact Statement (an "EIS") in connection with the acquisition of the easement. When the district court dismissed their claims by way of summary judgment, *Sabine River Authority v. United States Dept. of Interior*, 745 F.Supp. 388 (E.D.Tex.1990), they appealed. We affirm.

The district court correctly dismissed the claims brought by the Sabine River Authority and the Texas Water Conservation Association, and we are hard-pressed to improve upon its scholarly work. Its survey of the relevant case law was extensive, its analysis persuasive. Rather than dilute the strength of the district court's reasoning and pollute the legal environment

with an expansive discussion of our own, we write only to express the depth of our commitment to the district court's fluid opinion. We must remediate in one area, however, filtering out the minute particles (*672) of contaminant in the district court's "standing" water.

PHASE I

Wetlands, with its swamps, marshes, bogs, mud flats and other water-dependent community types, are an ecological treasure. They play a vital role for wildlife by providing nesting and habitat for many species of fish, birds, plants and other wildlife. For the bird community, wetlands foster high species diversity, density, and productivity by providing both food and habitat, in the form of nesting sites, breeding and rearing areas, feeding grounds, and cover from predators. Office of Technology Assessment, *Wetlands: Their Use and*

Regulation, at 5-6, 30, 52 (1984). Many endangered species rely on our wetlands for their survival and reproductive success. Without the wetlands, we are all but assured of their extinction.

Beyond the direct import of wetlands to wildlife, they also serve other equally significant environmental functions. One of the more apparent is their favorable effect on our water quality. By filtering contaminants out of water before they can reach the open water, wetlands serve as nature's own water purifier. By absorbing large amounts of water, wetlands protect us from potential flooding.

As with many of our most precious natural resources, our wetlands are threatened by commercial, agricultural, and industrial development. In the last 200 years, thirty to fifty percent of our nation's wetlands have disappeared. Because wetlands are

critical to flood control, water supply, water quality, and, of course, wildlife, their rapid disappearance is setting the stage for what may eventually become a significant environmental catastrophe. The State of Texas alone has lost 8 million acres, nearly half of its original wetlands. With only some 7.6 million acres remaining, wetlands presently constitute a mere 4.4 percent of Texas' acreage. As the wetlands continue to shrink, the threat to our environment escalates.

Recognizing that our nation's wetlands are vital to the environmental equilibrium, the Fish and Wildlife Service embarked on a laudatory effort to preserve the existing wetlands. The Fish and Wildlife Service is charged with the responsibility of protecting and maintaining the population of migratory waterfowl, other wildlife resources, and endangered species. Toward

that end, it established the National Wildlife Refuge System, a project that has earned widespread approval from environmental groups. Through the Refuge System, the Fish and Wildlife Service has acquired millions of acres of environmentally rich lands, lands which are to be preserved in their natural state: no development, no mining, just mother nature's original recipe without any artificial ingredients. These lands provide a winter home to the thousands of migratory birds utilizing the "Central Flyway" and support large populations of Native North American wood ducks. U.S. Fish and Wildlife Service, *Wetlands of the United States: Current Status and Recent Trends* at 15 (1984).

Some of the land is acquired in fee simple; but since the Fish and Wildlife Service merely seeks to prohibit environmentally destructive activity on the land,

much of it is obtained in the form of leases and easements which preclude development of the land. This method proves far more economical in effectuating the goal of preventing adulteration to the lands, because the government need not buy the property and take title outright; it can accept a non-development easement-a promise by the owner to refrain from developing the property in a manner inconsistent with wetland preservation-and thereby achieve the goal of protecting the environmental status quo at a fraction of the cost.

The Fish and Wildlife Service acquired the Texas wetlands at issue in this case precisely in this manner. Little Sandy Hunting and Fishing Club donated a non-development easement on approximately 3800 acres of its land to the Fish and Wildlife Service so that the character of the wetlands would remain unchanged, undeveloped,

in perpetuity. These lands had been targeted by the Fish and Wildlife Service for several years because of its (*673) particula..y rich natural attributes. Some studies rated the vegetation on Little Sandy's land as "one of the most pristine bottomland areas i[n] the state [of Texas]." The lands consist of "old-growth timber," including willow, oak, hickory, gum, elm, ash, hackberry, palmetto, switchcane, and possum haw understory, and its bottomlands play host to such dwellers as mallards, gadwalls, ringnecks, and wood ducks.

The Sabine River Authority and the Texas Water Conservation Association, cognizant that the federal government's acquisition of this land foreclosed the State of Texas from taking the property by means of eminent domain, were less than pleased to learn of the donation. They had given serious consideration to using that land to

construct the Waters Bluff Reservoir, a $158 million, forty- five thousand acre project along the Sabine River in Smith, Upshur, and Wood Counties. Their plans for the construction of the reservoir, aimed at satisfying the anticipated need for additional water over the next forty years, were still in the preliminary stages: they had obtained none of the necessary federal and state permits, had secured no funding, and had not yet entered into any firm contracts for the 300 thousand plus acre feet of water that the reservoir would generate each year. Nevertheless, they were dissatisfied with the turn of events and filed suit in the Eastern District of Texas alleging that the Fish and Wildlife Service had failed to comply with the procedural requirements of NEPA by not preparing an Environmental Impact Statement (an "EIS") in connection with its acquisition of the

Little Sandy non-development easement. They alleged that the easement was interfering with their long-term plan to take the property by eminent domain, construct the Waters Bluff Reservoir, and thus insure that the state's water supply would not be placed in jeopardy in the calendar year 2030. Invoking NEPA, they asserted that the Fish and Wildlife Service's acquisition of the easement constituted a "major federal action significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C), thereby necessitating the preparation of an EIS.

In a comprehensive opinion, 745 F.Supp. 388 (E.D.Tex.1990), the district court dismissed their claims by way of summary judgment. The court reasoned that the Fish and Wildlife Service had prepared an adequate Environmental Assessment (the "EA") and had issued a "Finding of No Significant Impact"

("FONSI") as a precursor to acquiring the easement. Concluding that there was no corresponding change in the physical environment flowing from the acquisition of the non-development easement, the district court held that the Fish and Wildlife Service's decision to forego an EIS was not arbitrary and capricious. *Id.* at 392-97. It dismissed the lawsuit, and this appeal followed.

PHASE II

A preliminary issue in this case, indeed in every case, is whether the party bringing the lawsuit has standing. After rejecting on the merits plaintiffs' challenge to the Fish and Wildlife Service's decision to forego an EIS, the court below remarked that plaintiffs had no standing to bring this lawsuit in the first place. It reasoned that:

> The Court's finding that the plaintiffs' claims are not within NEPA's scope and that they are contrary to NEPA's purpose compels the conclusion that the plaintiffs lack standing to assert a claim under NEPA. The plaintiffs' interest in constructing a reservoir is unquestionably an interest that is *subject* to the provisions of NEPA, but it is not an interest that NEPA was designed to protect.

745 F.Supp. at 397. In essence, the district court concluded that because the Fish and Wildlife Service was not obligated under NEPA to prepare an EIS under the circumstances present in this case (a conclusion with which we agree), the injuries alleged by the plaintiffs as a consequence of the absence of an EIS were not within the zone of interests protected by NEPA. With that conclusion we disagree.

[1-3] The standing inquiry has constitutional, statutory, and judicially formulated (*674) components. *North Shore Gas v. EPA*, 930 F.2d 1239, 1242-43 (7th Cir.1991). It has as its origins the con-

stitutional requirement that federal courts only decide cases or controversies. Constitution, Article III, § 2. When we say that a particular plaintiff has no standing to bring the lawsuit in the constitutional sense, we mean that the plaintiff has not suffered an injury which is redressible by the court. *Allen v. Wright*, 468 U.S. 737, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). This inquiry places not too heavy a burden on a prospective plaintiff because even "a probabilistic benefit from winning a suit is enough 'injury in fact' to confer standing" under the Constitution. *North Shore Gas*, 930 F.2d at 1242.

[4] From an Article III perspective, the plaintiffs have standing. "Injury in fact is not confined to economic injury, but may include injuries to aesthetics and well-being." *Save Our Wetlands, Inc. v. Sands*, 711 F.2d 634, 640 (5th Cir.1983).

> The procedural injury implicit in agency failure to prepare an EIS-the creation of a risk that serious environmental impacts will be overlooked-is itself a sufficient 'injury in fact' to support standing, provided this injury is alleged by a plaintiff having a sufficient geographical nexus to the site of the challenged project [such that they can] expect [ ] to suffer whatever environmental consequences the project may have.

City of Davis v. Coleman, 521 F.2d 661, 671 (9th Cir.1975); *accord Friends of the Earth v. U.S. Navy*, 841 F.2d 927, 932, *modified*, 850 F.2d 599 (9th Cir.1988); *see also South East Lake View Neighbors v. Dept. of Housing and Urban Development*, 685 F.2d 1027, 1039 (7th Cir.1982) (construing *City of Davis* to hold that the "injury occurred with the creation of a risk that potential environmental damage would go undiscovered"); *cf. North Shore Gas*, 930 F.2d at 1242 ("a probabilistic benefit from winning a suit is enough 'injury in fact' to confer standing in the undemanding

Article III sense"); *but see Greenpeace USA v. Stone*, 748 F.Supp. 749, 755 (D.Hawaii 1990) (expressing concern over whether a plaintiff with a geographical nexus to project satisfies the injury in fact requirement by virtue of a procedural injury alone), *appeal dismissed as moot*, 924 F.2d 175 (9th Cir.1991).

[5] The Sabine River Authority has been charged by the State of Texas with the weighty responsibility of managing, conserving, and monitoring the waters of the Sabine River in order to meet the "domestic uses of the people in the district, including all necessary water supplies for cities and towns." Water Aux. Laws art. 8280-133, § 14(d). It has alleged an economic injury (shortage of water supply) attendant to the Fish and Wildlife Service's acquisition of the Little Sandy Easement. The Texas Water Conservation Association is an organization

incorporated under the laws of the State of Texas which has as its stated mission the conservation of water resources of the state. Its membership includes "river authorities, individuals, firms, corporations, cities, water districts, public and private agencies and groups dedicated to the task of conserving, developing, protecting and utilizing the water resources of Texas for beneficial purposes." This organizational plaintiff has a "sufficient geographical nexus" to the Little Sandy property, and the interests at stake affect the members of the organization such that the organization has standing to bring the claims on their behalf. *See Save Our Wetland, Inc.*, 711 F.2d at 640 (organizational plaintiff had standing because member of organization who fished at site in question was "injured" by adverse aesthetic impact). The injuries that these

parties allege relate to the adverse environmental effects that they will experience as a result of the Fish and Wildlife Service's acquisition of the Little Sandy easement. As the district court observed:

> One effect of the [Fish and Wildlife Service]'s action is that as long as the easement remains in the National Wildlife Refuge System, [the Sabine River Authority] cannot build the Waters Bluff Reservoir. Although federal law provides certain procedures by which land may be released from the Refuge System, there is certainly a risk that [the Sabine River Authority] may not convince (*675) either the Congress or the Secretary of the Interior to relinquish the easement.

745 F.Supp. at 396 & n. 6. According to the plaintiffs, the Sabine River Authority's inability to condemn this property and build the Waters Bluff Reservoir on that site creates a substantial risk that the region will experience water shortages some forty years in the future. Although there is necessarily some speculation attendant to predictions of this sort,

the injuries alleged are not "too speculative to support their standing." *South East Lake View Neighbors*, 685 F.2d at 1035. While still in the early planning stages, plaintiffs were intent on going forward with the construction of the Waters Bluff Reservoir to pretermit any potential water shortage problems; the Little Sandy Easement has made that effort a virtual nullity. We therefore find "a fairly traceable causal connection between the defendant's allegedly illegal conduct and the plaintiff's purported injuries," *id.* at 1036, sufficient to confer standing in the constitutional sense.

[6] In the context of NEPA, however, the Supreme Court has recently explained that beyond the constitutional standing requirements, "the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls

within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan v. National Wildlife Federation*, - U.S. -, 110 S.Ct. 3177, 3186, 111 L.Ed.2d 695 (1990) (emphasis in original); *see also Greenpeace USA*, 748 F.Supp. at 756 (*Lujan* "appears to heighten the requirements for establishing actual injury for purposes of standing under NEPA."). "[T]he only people who may sue to enforce a law are people who belong to the class that the law was designed to protect." *North Shore Gas*, 930 F.2d at 1243. In other words, "only intended beneficiaries of a statute can seek relief under it." *Id.* To illustrate, the Supreme Court posited that court reporters are plainly aggrieved when an agency fails to comply with a statutory provision that requires that all proceedings be transcribed; nevertheless, because

the parties to the proceedings, and not the court reporters, are the intended beneficiaries of the statutory provision, the parties and not the court reporters would have standing to challenge the agency's non-compliance with the statute. *Lujan*, 110 S.Ct. at 3186.

[7] We are persuaded that the injuries alleged by the plaintiffs in their complaints-harmful effects on the quality and quantity of East Texas' water supply-"are among the *sorts* of interests" that NEPA was specifically designed to protect. *Lujan*, 110 S.Ct. at 3187. These alleged injuries fall squarely within the class of injuries that NEPA safeguards: the circuit courts, to be sure, are flooded with cases which elucidate that water quality and water supply are prototypically matters of great environmental concern. *E.g., Olmsted Citizens for a Better Community*, 793 F.2d

201, 205 (8th Cir.1986) (a federal action which "poses a threat to the physical resources of the area because of anticipated . . . water supply problems" must be preceded by an EIS); *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848, 851-53 (9th Cir.1979) (holding that an EIS was required "to evaluate the environmental consequences of [the] decision [to divert water to industrial use]"); *City of Davis v. Coleman*, 521 F.2d 661, 671-72 (9th Cir.1975) (allegations in complaint "that the planned industrial development . . . may adversely affect the quality and quantity of the city water supply" established injury in fact within the zone of interests of NEPA). Indeed, NEPA itself articulates that the protection of the water quality and supply is an important concern of the statutory scheme. *See* 42 U.S.C. §§ 4321, 4331(c); *see also Metropolitan Edison Co.*

v. People Against Nuclear Energy, 460 U.S. 766, 103 S.Ct. 1556, 1560-61, 75 L.Ed.2d 534 (1983) (quoting from statements of two principal sponsors of NEPA which identify water supply and quality as a concern of NEPA). Moreover, these plaintiffs are the proper plaintiffs to raise these claims. Although "the intended beneficiaries of NEPA are individual citizens . . . the statute expressly contemplates that state and (*676) local governments are to play an important role in the effectuation of national environmental policy." *City of Davis*, 521 F.2d at 672 (citing 42 U.S.C. §§ 4331(a), 4332(2)(C), 4332(2)(F), 4341(4), 4345(1)).

This is not a case brought by a disappointed contractor who alleges that he has been injured because he would have been hired to build the Waters Bluff Reservoir had the Fish and Wildlife Service not ac-

cepted the negative easement. Like the court reporter example posited in *Lujan*, the contractor, though arguably aggrieved as a result of the Fish and Wildlife Service's acceptance of the negative easement, would not have standing under the "zone of interests" test because NEPA was not designed to protect contractors' rights: it was designed to protect the environment. Perhaps the best way to illustrate the point is to put the proverbial cart before the horse. If, contrary to our holding on the merits, NEPA *did* require the Fish and Wildlife Service to prepare an EIS in connection with the Little Sandy easement, we would still have to consider whether these plaintiffs have standing to challenge the Fish and Wildlife Service's non-compliance. We think it is quite plain that the Sabine River Authority and the Texas Water Conservation Association would

(and do) have standing to bring a lawsuit because the alleged harm flowing to these plaintiffs from the defendant's non-compliance with NEPA is of a kind with which NEPA is concerned.

PHASE III

[8] This case arises under the network of NEPA, a statute drafted to ensure that federal agencies "carefully consider detailed information concerning significant environmental impacts," and at the same time "guarantee[ ] that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 109 S.Ct. 1835, 1845, 104 L.Ed.2d 351 (1989); *accord North Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1540 (11th Cir.1990). It is a procedural statute that

demands that the decision to go forward with a federal project which significantly affects the environment be an environmentally conscious one. The statute does not command the agency to favor an environmentally preferable course of action, only that it make its decision to proceed with the action after taking a "hard look at environmental consequences." *Robertson*, 109 S.Ct. at 1846 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n. 21, 96 S.Ct. 2718, 2730 n. 21, 49 L.Ed.2d 576 (1976)). Indeed, NEPA does not prohibit the undertaking of federal projects patently destructive of the environment; it simply mandates that the agency gather, study, and disseminate information concerning the projects' environmental consequences. "Other statutes may impose substantive environmental obligations on federal agencies, but

NEPA merely prohibits uninformed-rather than unwise-agency action." *Id.*

[9] How much information the agency must process is the subject of this litigation. NEPA instructs that federal agencies:

> include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-
>
> (i) the environmental impact of the proposed action, [and]
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented . . . .

42 U.S.C. § 4332(2)(C). Thus, NEPA directs federal agencies to prepare what is commonly known in the industry as an Environmental Impact Statement (an "EIS") when it engages in "major Federal action[ ] significantly affecting the environment."

> "An environmental impact statement is intended to detail the environmental and economic effects of any proposed federal action so that those not directly involved can understand and

> give meaningful consideration to and make appropriate comment on the factors involved. It also *677 ensures that the decisionmaker give serious weight to environmental factors in making discretionary choices."

State of Louisiana v. Lee, 758 F.2d 1081, 1084 (5th Cir.1985). An EIS is "not required for *non* major action or a major action which does not have *significant* impact on the environment." *Sierra Club v. Hassell*, 636 F.2d 1095, 1097 (5th Cir. Unit B 1981) (emphasis added).

[10] To assist federal agencies in resolving whether they must prepare an EIS, the federal Council on Environmental Quality ("CEQ") has issued regulations to which these agencies can turn for guidance. *Sierra Club v. Marsh*, 769 F.2d 868, 870 (1st Cir.1985). These regulations are entitled to substantial deference, *Robertson*, 109 S.Ct. at 1848, and "are binding on federal agencies." *Fritiofson v. Alexander*, 772 F.2d 1225, 1236 (5th Cir.1985).

> The CEQ regulations permit federal agencies to make a preliminary "Environmental Assessment" ("EA") aimed at determining whether the environmental effects of a proposed action are "significant." 40 C.F.R. §§ 1501.3, 1501.4, 1508.9, 1508.27 (1984). According to these regulations, the EA is a "concise" document that "briefly" discusses the relevant issues and either reaches a conclusion that preparation of an EIS is necessary or concludes with a "Finding of No Significant Impact" (called in environmental jargon, a "FONSI"). *Id.* §§ 1508.9, 1508.13.

Sierra Club v. Marsh, 769 F.2d at 870. Thus, "[t]he purpose of an EA is to 'provide sufficient evidence and analysis for determining whether to prepare an [EIS].' " *Fritiofson*, 772 F.2d at 1236 (quoting 40 C.F.R. § 1508.9(a)(1)). The EA is "a rough-cut, low-budget environmental impact statement designed to show whether a full-fledged environmental impact statement-which is very costly and time-consuming to prepare and has been the kiss of death to many a federal project-is neces-

sary." *Cronin v. U.S. Dept. of Agriculture*, 919 F.2d 439, 443 (7th Cir.1990). The EA will come to one of two findings: either that the project requires the preparation of an EIS to detail its environmental impact, or that the project will have no significant impact (a "FONSI") necessitating no further study of the environmental consequences which would ordinarily be explored through an EIS. *Fritiofson*, 772 F.2d at 1236; *Marsh*, 769 F.2d at 870.

[11] When, as in this case, the agency concludes that the preparation of an EIS is not required based on a FONSI, an aggrieved party may challenge the decision in federal court under the Administrative Procedures Act. 5 U.S.C. § 706(2)(A). Before today, our court instructed that a reviewing court should apply the moderately deferential "reasonableness" standard-rather than the highly deferential "arbitrary and capri-

cious" standard adopted by other circuits-in reviewing an agency's decision to forego an EIS. *See Fritiofson*, 772 F.2d at 1237. However, in *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989) ("*Oregon Natural*") the Supreme Court held that an agency's decision not to prepare a supplemental EIS is reviewable under the "arbitrary and capricious" standard. This intervening decision by the Supreme Court warrants the abandonment of the "reasonableness" standard.[1] Even though *Oregon Natural* involved an agency's decision not to prepare a *supplemental* EIS as opposed to an agency's decision not to prepare the *original* EIS, the "legal standard

---

[1]The *Fritiofson* panel rejected an invitation to abandon the reasonableness standard in favor of the "arbitrary and capricious" standard adopted by other circuits, recognizing that it could only do so if an intervening Supreme Court decision mandated as much.

for determining when a *supplemental* EIS is required is 'essentially the same as the standard for determining the need for an *original* EIS.' " Fritiofson, 772 F.2d at 1239 n. 8 (citation omitted). *Oregon Natural* has plainly emasculated our precedent applying the reasonableness standard with respect to the review of an agency's decision to forego a *supplemental* EIS. *See Oregon Natural*, 109 S.Ct. at 1861 n. 23 (citing with disapproval our decision in *Sierra Club v. Froelhlke*, 816 F.2d 205, 210 (5th Cir.1987)). We believe that it has similarly (*678) undercut our precedent applying the reasonableness standard with respect to an agency's decision to forego the *original* EIS. *See Lockhart v. Kenops*, 927 F.2d 1028, 1032 (8th Cir.) (holding that the intervening decision of *Oregon Natural* undercut Eight Circuit precedent applying the reasonableness standard with respect

review of an agency's decision to forego preparation of an original EIS), *cert. denied*, - U.S. -, 112 S.Ct. 186, 116 L.Ed.2d 148 (1991). The standard of review is limited, therefore, to the "arbitrary and capricious" standard. *Id.*; *see also North Buckhead Civic Ass'n*, 903 F.2d at 1538 (adopting "the arbitrary and capricious standard when reviewing agency action in NEPA cases").[2]

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[2]We recognize that the Eighth Circuit has held that *Oregon Natural* does not control the standard of review in a case where the issue involved is the threshold one of whether NEPA even applies at all. *Goos v. I.C.C.*, 911 F.2d 1283, 1292 (8th Cir.1990). If an agency determines that NEPA does not apply in the first instance, and the agency makes that determination without preparing an EA and without making a finding of no significant impact, the Eighth Circuit applies a reasonableness standard, not *Oregon Natural's* arbitrary and capricious standard. *Id.* We need not concern ourselves with these distinctions even though there is a substantial question presented in this case as to whether NEPA applies at all; the Fish and Wildlife Service decided to forego an EIS "after assuming the applicability of NEPA, after preparing an EA, and after determining that there was no significant [environmental] impact." *Goos*, 911 F.2d at 1292. Thus, the arbitrary and capricious standard of review applies. Although it is arguably a more lenient standard than the reasonableness test, *Fritiofson*, 772 F.2d at 1237-38, the differences

[12-14] Under this highly deferential standard of review, a reviewing court has the "least latitude in finding grounds for reversal." *North Buckhead Civic Ass'n*, 903 F.2d at 1538. It may not substitute its judgment for that of the agency, but must studiously review the record to ensure that the agency has arrived at a reasoned judgment based on a consideration and application of the relevant factors. *Id.*; *Oregon Natural*, 109 S.Ct. at 1861. Where conflicting evidence is before the agency, the agency and not the reviewing court has the discretion to accept or reject from the several sources of evidence. The agency may even rely on the opinions of its own experts, so long as the experts are quali-

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between the two standards is not "of great pragmatic consequence." *Oregon Natural*, 109 S.Ct. at 1861 n. 23 ("[O]ur decision today will not require a substantial reworking of NEPA."). And under either standard, we would affirm the judgment below.

fied and express a reasonable opinion. The reviewing court may be inclined to raise an eyebrow under such circumstances, but it must show the proper respect for an agency's reasoned conclusion even if the reviewing court finds the opinions of other experts equally or more persuasive. *Oregon Natural,* 109 S.Ct. at 1861.

> A reviewing court is to review the administrative records as well as other evidence to determine whether the agenc[y] adequately considered the values set forth in NEPA and the potential environmental effects of the project before reaching a decision on whether an environmental impact statement was necessary. If the agenc[y] engaged in this analysis and reasonably concluded on the basis of [its] findings that an impact statement was not required, [its] determination[ ] will be upheld.

Hassell, 636 F.2d at 1097-98. [3]

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[3] *Hassell* applied the "reasonableness" standard. Nevertheless, we believe that the inquiry under the "arbitrary and capricious standard" is clearly not more rigorous (though also only slightly more deferential) than that articulated in *Hassell*. *See Oregon Natural,* 109 S.Ct. at 1861 n. 23 ("[T]he difference between the 'arbitrary and capricious'

[15][16] When a court like ours is asked to review the decision of a district court which has sat as the reviewing court of first instance, the standard of review that we apply will vary depending on the course of proceedings below. If the district court has conducted an evidentiary hearing, and has drawn factual inferences and made credibility determinations, we must give great deference to the district court's conclusions.

> A court of appeals review of a district court review of an administrative agency's (*679) record is indeed an "awkward legal animal," but when the district court's judgment turns on factual matters, or upon the testimony of witnesses, or even upon lengthy evidentiary proceedings, the court of appeals should hesitate to reverse.

North Buckhead Civic Ass'n, 903 F.2d at 1539. Where, as here, the district court has resolved the case by way of summary

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and 'reasonableness' standards is not of great pragmatic consequence.").

judgment, our review of the district court's conclusions is plenary. We undertake the same task as the district court: we review the materials submitted to the district court (which will include the agency record) and determine whether the agency's conclusions were arbitrary and capricious. *Marsh*, 769 F.2d at 872 (1st Cir.1985). Because the district court's review pursuant to a summary judgment motion cannot turn on credibility determinations or conflicting factual inferences, *International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1264 (5th Cir.1991), we are in precisely the same position as the district court and can evaluate the record *de novo*.

PHASE IV

[17] The Fish and Wildlife Service concluded that by accepting the easement from Little Sandy, it did not undertake a major

federal action which significantly affected the environment. It prepared an EA which "adequately considered the environmental consequences of its actions." 745 F.Supp. at 402. The EA came to a finding of no significant impact (FONSI), and accordingly, the Fish and Wildlife Service did not find it necessary to prepare an EIS in connection with the acquisition of the easement. After a painstaking review of the agency record, the district court concluded that there was no clear error in the Fish and Wildlife Service's decision. We agree. As the district court observed:

> The [Fish and Wildlife Service]'s action in this case does not alter the environmental status quo; it does not cause any change in the physical environment. Indeed the purpose of the acquisition of the easement is to foreclose *any* change in the physical environment of a particular wetland site. As the Court observed in *National Association of Property Owners* [*v. United States*], NEPA does not require a federal agency to prepare an EIS in order "to leave nature

> alone." 499 F.Supp. [1223] at 1265 [D.C.Minn.1980)]. NEPA may require an EIS whenever a reservoir is built, but NEPA does not require preparation of an EIS whenever a reservoir is not built.

745 F.Supp. at 394. The district court recognized that the acquisition of the easement by the Fish and Wildlife Service did not effectuate *any* change to the environment which would otherwise trigger the need to prepare an EIS. "An "EIS is not required . . . when the proposed federal action will effect no change in the status quo." *Burbank Anti-Noise Group v. Goldschmidt*, 623 F.2d 115, 116 (9th Cir.1980), *cert. denied*, 450 U.S. 965, 101 S.Ct. 1481, 67 L.Ed.2d 614 (1981). Simply put, we hold that the acquisition of a negative easement which by its terms prohibits any change in the status quo does not amount to "major Federal action[ ] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); *see*

Burbank Anti-Noise Group, 623 F.2d at 116-17 (no EIS required where FAA provided federal financial assistance in connection with the purchase of an airport); *Sierra Club v. Marsh*, 692 F.Supp. 1210, 1221 (S.D.Cal.1988) ("It would be inconsistent with NEPA's purpose to allow the city to use NEPA to obstruct the implementation of a settlement which will protect endangered species."). An EIS need not discuss the environmental effects of continuing to use land in the manner which it is presently being used. *Upper Snake River v. Hodel*, 921 F.2d 232, 235 (9th Cir.1980) (citing *Burbank Anti-Noise Group*, 623 F.2d at 116); *see, e.g., Hassell*, 636 F.2d at 1099 (rebuilding bridge destroyed in hurricane did not require preparation of EIS under regulations then in effect); *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992, 1003 (D.C.Cir.1979) (no EIS required

when government leased parking lot to new parking management because no change in the status quo), *cert. denied*, 445 U.S. 915, 100 S.Ct. 1274, 63 L.Ed.2d 599 (1980).

(*680) The Supreme Court's decision in *Metropolitan Edison Co. v. People Against Nuclear Energy* makes clear that the inquiry in NEPA cases is whether the federal action at issue is "proximately related to a *change* in the physical environment." 103 S.Ct. at 1561 (emphasis added). The acquisition of a negative easement which prohibits development does not result in the requisite "change" to the physical environment. Of course, when the government *conveys* property to, or exchanges land with, a private party that plans to develop the land, an EIS is necessary because the conveyance of property is precipitating a change in the physical complexion of the land. *Lockhart v. Kenops*, 927 F.2d at 1033

(citing *National Forest Preservation Group v. Butz*, 485 F.2d 408, 411-12 (9th Cir.1973)); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1227 (9th Cir.1988), *cert. denied*, 489 U.S. 1066, 109 S.Ct. 1340, 103 L.Ed.2d 810 (1989); *Conservation Law Foundation of New England, Inc. v. General Services Administration*, 707 F.2d 626, 633 (1st Cir.1983). But by merely accepting title to the property-or, as in this case, accepting a negative easement which precludes any development of the land whatsoever-the government is not undertaking a project that changes the character or function of the land. *See Ono v. Harper*, 592 F.Supp. 698, 701 (D.Hawaii 1983) (no EIS required where proposed transfer of title would not cause any change in the physical environment). We view the Fish and Wildlife Service's "action" in accepting the negative easement as tantamount to

"inaction." *See Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1243 (D.C.Cir.1980) (no EIS required when federal government decides not to exercise its authority to prevent the State of Alaska from killing wolves on federal land); *State of Alaska v. Andrus*, 591 F.2d 537, 541 (9th Cir.1979) (same); *cf. Bunch v. Hodel*, 793 F.2d 129, 135-36 (6th Cir.1986) (abdication of the Fish and Wildlife Service's obligations under the terms of a lease and the Migratory Bird Conservation Act could not be viewed as "inaction").

The agency came to a finding of no significant environmental impact, and we detect no error in that forecast.[4] "The court finds it unlikely that a no impact finding would be held unreasonable where

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[4]Ironically, neither does the defendant-intervenor Sierra Club, an environmental group which for the first time, apparently, has advocated *against* the need for an EIS.

the government seeks to acquire some additional parcels of land for environmental mitigation purposes." *Sierra Club v. Marsh*, 692 F.Supp. at 1221. The land is earmarked as a wildlife habitat and migratory bird refuge. We agree with the Fish and Wildlife Service and the district court that this intended "use" of the Little Sandy property has no significant environmental impact. On this point, we note that we are not altogether persuaded that the anticipated harm to the East Texas water supply can be precisely linked to the federal action at issue here. Although for purposes of standing we have held that the plaintiffs have established an injury in fact sufficient to bring these claims, an EIS is only necessary where there is "reasonably close causal relationship between a change in the physical environment and the effect at issue." *Metropolitan*

Edison, 103 S.Ct. at 1561. Aside from the absence of any "change" in the physical environment, we entertain serious doubts as to whether the adverse impact on water quality and supply expected in the year 2030 can be attributed to the Fish and Wildlife Service's acquisition of the Little Sandy easement. In our view, plaintiffs seek to stretch the parameters of predictability to their limits. They ask for environmental clairvoyance, though the agency personnel-and we judges-are but mere mortals.

We have given the record more than just a birds-eye view, and finding no reason to migrate from the district court's judgment, we take refuge in its nest.

AFFIRMED.

745 F.Supp. 388 (E.D.Tex. 1990)

SABINE RIVER AUTHORITY, Plaintiff,
Texas Water Conservation Association,
Plaintiff-Intervenor,
v.
UNITED STATES DEPARTMENT OF INTERIOR,
Donald Paul Hodel, in his official capacity as Secretary of Interior, United States Fish and Wildlife Service,
Frank H. Dunkel, in his official capacity as Regional Director of the Fish and Wildlife Service, and Little Sandy Hunting and Fishing Club, Defendants,
The Sierra Club and the National Audubon Society, Defendants-Intervenors.

No. TX-87-36-CA.
United States District Court,
E.D. Texas,
Texarkana Division.
Aug. 13, 1990.

Action was brought challenging the Fish and Wildlife Service's compliance with (*389) the National Environmental Policy Act in connection with the proposed acquisition of a conservation easement on wetlands habitat. On cross motions for summary judgment, the District Court, Paul N. Brown, J., held that: (1) the proposed acquisition did not change the status quo or have a detrimental impact on the environ-

ment and, thus, no environmental impact statement was necessary; (2) the environmental assessment prepared by the Fish and Wildlife Service gave adequate consideration to the need for action, to alternatives, and to comments received from other state and federal agencies; and (3) the general plan under which the Service would acquire easements to protect wetlands habitat was not a "proposal" for major federal action that would require an environmental impact statement.

Claims dismissed.

William H. Burchette, Christine Ryan, Jorden Schulte & Burchette, Washington, D.C., and Carl Roberts, Longview, Tex., Frank R. Booth, Booth & Newsome, Austin, Tex., for Sabine River Authority and Texas Water Conservation Ass'n, respectively.

Ruth Harris Yeager, First Asst. U.S. Atty., Tyler, Tex., Lisa Hemmer, U.S. Dept. of Justice, Washington, D.C., Joseph I. Worsham, Dallas, Tex., for Federal defendants and Little Sandy Club, respectively.

Wendy S. Dinner, Washington, D.C., for Sierra Club and National Audubon Society.

MEMORANDUM OPINION AND ORDER

PAUL N. BROWN, District Judge.

Pending before the Court are Motions for Summary Judgment filed by all parties. After carefully reviewing all of the motions and supporting briefs, the lengthy administrative record, and the applicable law, the Court finds that the motions of the defendants should be granted and those of the plaintiffs denied.

I. BACKGROUND

The dispute in this case concerns the decision of the Department of the Interior's Fish and Wildlife Service ("FWS") to accept

a conservation easement on 3800 acres of land owned by the Little Sandy Hunting and Fishing Club ("Club"). The FWS's acquisition of this easement conflicts with the plans of plaintiff Sabine River Authority ("SRA") to construct the Waters Bluff Reservoir. If constructed, the reservoir would inundate the lands encompassed by the easement.

Before acquiring the easement, the FWS prepared a draft environmental assessment ("EA") of the proposed acquisition pursuant to Department of Interior regulations implementing the review process mandated by the National Environmental Policy Act, 42 U.S.C. § 4332 ("NEPA"). (AR. P).[1] The FWS also conducted a public hearing on the proposed acquisition. (AR. I). Thereafter, the FWS issued a final EA recommending acquisition of the easement. (AR. D). The

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[1] "AR" refers to the Administrative Record.

FWS also issued a "Finding of No Significant Impact" ("FONSI") setting forth the FWS's conclusion that NEPA did not require the FWS to prepare an environmental impact statement ("EIS") concerning its acquisition of the easement. (AR. G-79). The FWS then accepted the easement.

Plaintiffs' Claims

SRA contends that the FWS's FONSI and decision not to prepare an EIS concerning its acquisition of the easement violated the provisions of NEPA. SRA claims that the FONSI is erroneous because acquisition of the easement is a "major Federal action [ ] significantly affecting the quality of the human environment" that requires the preparation of an EIS. SRA also claims that the FWS's EA is inadequate in several respects and that this matter should be remanded to the FWS for further consideration. Finally, SRA alleges that the acquisition

of the easement violated the Fish and Wildlife Act, 16 U.S.C. § 742a *et seq.* and the Refuge Recreation Act, 16 U.S.C. § 460k *et seq.*, because the terms of the easement do not provide for a right of access for the public.

Plaintiff-Intervenor Texas Water Conservation Association ("TWCA") also contends that the FWS should have prepared an EIS concerning its acquisition of the easement. In addition, TWCA asserts that the FWS's Texas Bottomlands Hardwood Preservation Program ("Preservation Program") is itself a "major Federal action [ ] significantly affecting the quality of the human environment" and that the FWS should have prepared an EIS concerning the Preservation Program.

The FWS and the Defendant-Intervenors Sierra Club and National Audubon Society (*392) contend that the FONSI is correct

since the easement preserves the "environmental status quo" by prohibiting development on the land encompassed by the easement. The FWS also contends that its EA was adequate and that it was not required to prepare an EIS concerning the Preservation Program. Finally, the FWS asserts that the terms of the easement do not violate the provisions of either the Fish and Wildlife Act or the Refuge Recreation Act.

II. STANDARD OF REVIEW

[1] The standard of review that this Court must apply to this case is set forth in *State of Louisiana v. Lee*, 758 F.2d 1081 (5th Cir.1985), *cert. den.*, 475 U.S. 1044, 106 S.Ct. 1259, 89 L.Ed.2d 570 (1986).

> NEPA requires the preparation of an [EIS] whenever a major federal action significantly affecting the quality of the human environment is proposed. . . . Judicial review of an agency's decision not to file an [EIS] is governed by the rule of reasonableness .

> . . whether the agency['s] decision not to develop an impact statement is reasonable and made objectively and made in good faith on a reviewable environmental record. . . . If the decision is reasonable, the determination must be upheld.

Id. at 1083.

The plaintiffs' burden in presenting a NEPA claim is also well-established.

> [T]he court must determine whether the plaintiff has alleged facts which, if true, show that the recommended project would materially degrade any aspect of environmental quality . . . If the court concludes that no environmental factor would be significantly degraded by the project, [the] determination not to file the [EIS] should be upheld. On the other hand, if the court finds that the project *may* cause a significant degradation of some human environmental factor (even though other environmental factors are affected beneficially or not at all), the court should require the filing of an impact statement . . . .

Id. at 1084.

The plaintiff "must establish only that the [defendant] was unreasonable in concluding there was no reasonable possibility that the proposed action would signifi-

cantly degrade any environmental factor." *Id.* at 1085.

The Supreme Court has held that an agency's decision not to file an EIS should be reviewed under the "arbitrary and capricious" standard. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, -, 109 S.Ct. 1851, 1860, 104 L.Ed.2d 377 (1989). The Court suggested that there is little or no difference between this standard and the "reasonableness" standard that had been applied heretofore by courts in most of the circuits, including the Fifth Circuit. 490 U.S. at -, 109 S.Ct. at 1861 n. 23. In applying this standard of review, a court "must consider whether the decision [not to prepare an EIS] was based on a consideration of the relevant factors and whether there has been a clear error in judgment". 490 U.S. at -, 109 S.Ct. at 1861.

An agency's decision not to prepare an EIS may be erroneous for one of two different reasons. The evidence in the record may indicate that, "contrary to the FONSI, the agency's proposed action may have a significant impact on the human environment", or the record may show that the agency's NEPA review process was "flawed in such a manner that it cannot yet be said whether the [proposed action] may have a significant impact". *Fritiofson v. Alexander*, 772 F.2d 1225, 1238 (5th Cir.1985). If a court finds that the proposed action may have a significant impact, the court should order the agency to prepare an EIS. *Id.* On the other hand, should the court determine that the agency's review was inadequate, the court should remand the case to the agency for further proceedings to correct the inadequacies. *Id.*

III. REVIEW OF THE FONSI

[2] An agency need not prepare an EIS for actions that do not "significantly affect [ ] the quality of the human environment". *Citizen Advocates for Responsible Expansion, Inc. v. Dole*, 770 F.2d 423, 432 (5th Cir.1985). In determining whether (*393) particular agency actions "significantly affect [ ] the quality of the human environment", courts have analyzed an agency's action to determine whether those actions may alter the "environmental status quo" or cause a "significant degradation of some human environmental factor".

A federal agency proposing an action must prepare an environmental impact statement if that action may cause "a change in the [environmental] status quo." *Sierra Club v. Hassell*, 636 F.2d 1095, 1099 (5th

Cir.1981).[2] Any agency action that "may cause a significant degradation of some human environmental factor" also requires the preparation of an EIS. *State of Louisiana v. Lee*, 758 F.2d at 1086. *Lee* and *Hassell* do not set forth different tests, however, since any action that "may cause a significant degradation" of the environment certainly may cause "a change in the environmental status quo". Whether a federal agency's action "may cause a significant degradation of some human environmental factor" is analyzed in light of the "environmental status quo" existing at the time of the proposed action. *Id.*

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[2] *See also Sierra Club v. F.E.R.C.*, 754 F.2d 1506, 1510 (9th Cir.1985); *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992, 1002-03 (D.C.Cir.1979), *cert. den.*, 445 U.S. 915, 100 S.Ct. 1274, 63 L.Ed.2d 599 (1980); *Burbank Anti-Noise Group v. Goldschmidt*, 623 F.2d 115, 116-17 (9th Cir.1980, *cert. den.*, 450 U.S. 965, 101 S.Ct. 1481, 67 L.Ed.2d 614 (1981).

The principle underlying the determination of whether an agency's action may "significantly affect [ ] the quality of the human environment", by altering the "environmental status quo" or causing "a significant degradation of some human environmental factor" is that NEPA applies only to those federal actions whose effects may cause *changes in the physical environment*. NEPA's legislative history shows that Congress was only concerned with the effects of federal actions that may cause *changes* in the physical environment. "What is involved [in NEPA] is a congressional declaration that . . . . *we will not intentionally initiate actions which do irreparable damage to the air, land, and water . . . .*" *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772-73, 103 S.Ct. 1556, 1560, 75 L.Ed.2d 534 (1983), *citing*, 115 Cong.Rec.

40416 (1969) (Emphasis original). Indeed, a change in the physical environment is the *sine qua non* of any action that alters the "environmental status quo" or causes a "significant degradation of some human environmental factor".

Courts have recognized that federal actions that do not change the status quo of the physical environment do not require the preparation of an EIS under NEPA.[3] For example, in *Ono v. Harper*, 592 F.Supp. 698, 701 (D. Hawaii 1983), local governmental authorities sued to block the transfer of federally owned land to private individuals. The Court stated that "the focus of an [EIS] is the change in the physical environment caused by the federal action at issue" and dismissed the local authorities' NEPA claim because the authorities had not alleged that the transfer of title to the

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[3] *See* Cases cited at note 2.

land would cause any change in the physical environment. *Id.* at 701. In *National Association of Property Owners v. United States*, 499 F.Supp. 1223 (D.Minn.1980), *aff'd*, 660 F.2d 1240 (8th Cir.1981), *cert. den.*, 455 U.S. 1007, 102 S.Ct. 1645, 71 L.Ed.2d 876 (1982), the district court rejected a challenge to the implementation of restrictions on recreational activities in a federally-designated wilderness area under the Boundary Waters Canoe Area Wilderness Act, based upon the claim that an EIS was required before the restrictions could be implemented. 499 F.Supp. at 1264-66. The Court held that implementation of the restrictions on activities in the wilderness area did not "significantly affect [ ] the quality of the human environment". *Id.* at 1265.

> [T]he Secretary's implementation of the Act enables no person to significantly affect the Wilderness. In

> fact, plaintiffs' major complaint is simply that Congress' mandate to the Secretary will effectively close portions of the Wilderness. . . . In essence, plaintiffs' claim is that the Department of Agriculture must prepare an (*394) EIS in order to leave nature alone. The Court is not moved by this argument.

Id.

Finally, the principle that NEPA applies only to those federal actions that may cause changes in the physical environment is supported by the corollary principle that NEPA does not require an agency to consider those potential effects of a proposed action that do not have a "reasonably close causal relationship [to] a change in the physical environment caused by the major federal action at issue". *Metropolitan Edison*, 460 U.S. at 774, 103 S.Ct. at 1561. "[T]he congressional concerns that led to the enactment of NEPA suggest [ ] that the terms 'environmental effect' and 'environmental impact' in [NEPA] be read to

include a requirement of a reasonably close causal relationship between a *change* in the *physical* environment and the effect at issue." *Id.* at 774, 103 S.Ct. at 1561. Accordingly, any alleged effects of an agency's action that do not have a reasonably close causal relationship to a change in the physical environment caused by the agency's action are not within the scope of NEPA and can not form the basis of a NEPA claim.

In summary, whether the FWS should have prepared an EIS concerning its acquisition of the conservation easement depends upon whether the FWS's action is one that may "significantly affect [ ] the quality of the human environment", which, in turn, depends upon (1) whether the FWS's action may cause "a significant degradation of some human environmental factor" through a change in the physical environment, and (2)

whether the allegedly significant effects of the FWS's action have a reasonably close causal relationship to any change in the physical environment caused by the FWS's action.

No Change in the Status Quo

[3] The FWS's action in this case does not alter the environmental status quo; it does not cause any change in the physical environment.[4] Indeed the purpose of the acquisition of the easement is to foreclose *any* change in the physical environment of a particular wetland site. As the Court observed in *National Association of Property Owners*, NEPA does not require a federal

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[4] The FONSI issued by the FWS is also consistent with FWS regulations that categorically exclude from the NEPA review process

> [t]he acquisition of land in accordance with the Service's procedures, when the acquisition is from a willing seller, the acquisition planning process has been performed in coordination with the affected public and continuance of essentially the existing use is planned.

Department of the Interior Department Manual, 30 AM 2, Ex. 4, 516 DM 6 App. 1, 1.4A(4) (4/30/84).

agency to prepare an EIS in order "to leave nature alone". 499 F.Supp. at 1265. NEPA may require an EIS whenever a reservoir is built, but NEPA does not require preparation of an EIS whenever a reservoir is *not* built.

Under *State of Louisiana v. Lee*, the plaintiffs' burden in this case is to allege facts which, if true, would show that the FWS's action may cause "a significant degradation of some human environmental factor" through a change in the physical environment. The plaintiffs have failed to sustain this burden. The Court finds that when the FWS acquires an interest in land, such as a conservation easement, for the express purpose of preserving the land in its then-existing natural state, there is no reasonable possibility that such action may cause "a significant degradation of

some human environmental factor" through a change in the physical environment.

Absence of a Causal Connection

[4] As indicated by the Court in *Metropolitan Edison*, NEPA requires that federal agencies consider only the effects of actions that have a reasonably close causal relationship to changes in the physical environment caused by those actions. The alleged "effects" of the FWS's action in this case are the "elimination" of a potential water supply--the Waters Bluff Reservoir--and the risk that the area served by the SRA will suffer water shortages in the future if the reservoir is not built. The plaintiffs allege that

> [a]cquisition of the Club easement and placement of that easement in the refuge system immediately injured the interests (*395) of the SRA and others of TWCA's members by eliminating the Waters Bluff Reservoir and setting in motion the effects that followed the elimination of that water supply.

The harmful effect that the plaintiffs claim the FWS's action will have on the environment is the result of what the FWS's action *prevents* SRA and others from doing. Thus, the plaintiffs' claim presents the converse of the typical NEPA claim, which usually involves federal actions that initiate or permit development of natural resources. This case poses the novel question of whether NEPA requires consideration of the effects of federal actions when the effects of those actions are to *foreclose* development or use of some natural resource. The answer to this question is that NEPA does not require a federal agency to consider such effects since those effects result from what the federal action prohibits third parties from doing, and not from any "changes in the physical environment caused by the federal action" itself.

The cases cited by SRA and TWCA to support their position are inapposite.

TWCA cites the case of *Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848 (9th Cir.1979) for the proposition that a change in the use of water resources caused by federal action requires the preparation of an EIS. In *Andrus*, the Department of the Interior decided to implement a program of marketing substantial amounts of water for industrial uses from two *existing* reservoirs. The diversion of water resources affected both the prospects of future industrial development and the amount of water available for irrigation downstream from the reservoir. The Court of Appeals held that the program was a "major federal action" under NEPA that required the preparation of an EIS. *Id.* at 851-52. *Andrus* can be readily distinguished from this case on the following basis.

In *Andrus*, the diversion of existing water supplies from two existing reservoirs had the effect of altering the amount of water available to agricultural users in order to allocate additional water resources for industrial users. The federal action in *Andrus* clearly had an effect that *changed the physical environment*. In this case, there is no *existing* reservoir, there is no diversion of any existing water resources, and there is no *change in the physical environment* as a result of the acquisition of the easement by the FWS.

The other cases cited by the plaintiffs for the proposition that federal actions that may create "water-supply problems" always require the preparation of an EIS all concern the potential effects that *commercial or industrial development* may have upon water supplies. *See e.g. City of Davis v. Coleman*, 521 F.2d 661 (9th

Cir.1975). Yet commercial or industrial development can not take place absent some *change in the physical environment*. In *Coleman*, the federal action at issue was the proposed construction of a freeway interchange. The Court held in that case that the City of Davis had standing to prosecute a claim under NEPA since the city alleged that "the planned industrial development which the interchange will make possible may adversely affect the quality and quantity of the city water supply because of increased use and the danger of contamination by industrial wastes". *Id.* at 671. Commercial or industrial development and preservation are not synonymous under NEPA, and the FWS's acquisition of a conservation easement does not pose a "water-supply problem" that requires the preparation of an EIS.[5]

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[5] Another case cited by the plaintiffs, *Goodman*

The alleged effects of the FWS's action in this case are analogous to the effects analyzed in *Metropolitan Edison* and are likewise beyond the scope of NEPA. In *Metropolitan Edison*, the Nuclear Regulatory Commission prepared an EIS concerning the relicensing of a nuclear-powered electrical generating station. Although the Commission considered the risk of a nuclear accident in its EIS, it decided not to (*396) consider the effect of this risk upon the psychological health of those who lived near the power plant. The Supreme Court observed that

> a *risk* of an accident is not an effect on the physical environment [and] is, by definition, unrealized in the physical world. . . . We believe that the element of risk lengthens the causal chain beyond the reach of NEPA.

Group, Inc. v. Dishroom, 679 F.2d 182 (9th Cir.1982) does not address "watersupply problems", but instead holds that socioeconomic impacts of a federal action do not trigger NEPA's requirement of an EIS. *Id.* at 185-86.

Metropolitan Edison, 460 U.S. at 775, 103 S.Ct. at 1562. The same element of risk is present in the alleged effects of the FWS's action in this case.

One effect of the FWS's action is that as long as the easement remains in the National Wildlife Refuge System, SRA can not build the Waters Bluff reservoir. Although federal law provides certain procedures by which land may be released from the Refuge System, there is certainly a risk that SRA may not convince either the Congress or the Secretary of the Interior to relinquish the easement.[6] According to SRA, failing to build the Waters Bluff

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[6] No land that is a part of the Refuge System may be disposed of except by Act of Congress unless (1) the Department of the Interior and the Migratory Bird Conservation Commission determine that such lands are no longer needed for wildlife refuge purposes and the Department is paid the fair market value of the land, (2) the Department acquires other lands by exchange, or (3) such land is transferred pursuant to the terms of a cooperative agreement with a state or local government, by which agreement the land originally became part of the refuge system. 16 U.S.C. s 668dd(a)(3).

reservoir also creates a risk that SRA will face water shortages *in the future* that will adversely affect the economic welfare of the region that SRA serves. Yet a risk that the reservoir will never be built and that water shortages may occur in the future as a result is not an effect on the "physical environment". *Metropolitan Edison*, 460 U.S. at 775, 103 S.Ct. at 1562. There is no causal relationship between such speculative effects and any change in the physical environment caused by the acquisition of the easement. The element of risk inherent in the alleged effects of the FWS's action in this case "lengthens the causal chain beyond the reach of NEPA". *Id.* The Court finds that the effects of the FWS's action upon the plaintiffs are not within the scope of NEPA and can not form the basis of a NEPA claim.

Plaintiffs' Claims are Contrary to NEPA's Purpose

[5] The FWS's EA reveals that the FWS adequately considered the fact that SRA wanted to acquire the Club's land for an alternative use, but the FWS nevertheless chose to acquire the easement. (AR. D p. 20-21). A careful analysis of the plaintiffs' claims makes it abundantly clear that the plaintiffs simply object to the FWS's policy of acquiring conservation easements on wetland habitat where doing so poses a hindrance to the construction of reservoir projects. The plaintiffs' disagreement with the FWS is more akin to a political dispute over policy choices than a legal dispute over compliance with the procedural requirements of NEPA. *Cf. Foundation on Economic Trends v. Lyng*, 817 F.2d 882, 886 (D.C.Cir.1987). "Neither the language nor the history of NEPA suggests

that it was intended to give citizens a general opportunity to air their policy objections to proposed federal actions . . . [t]he political process, and not NEPA, provides the appropriate forum in which to air policy disagreements." *Metropolitan Edison*, 460 U.S. at 777, 103 S.Ct. at 1563.[7] To permit the plaintiffs to use the provisions of NEPA to voice their policy objections to the FWS's actions and to hinder the FWS's attempts to fulfill its mandate from Congress would be contrary to the purposes of NEPA.

An analogous situation was presented in the case of *Sierra Club v. Marsh*, 692 F.Supp. 1210 (S.D.Cal.1988). In that case, a city applied for an injunction to prohibit the transfer of certain property from

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[7] Legislation that would withdraw the Club Easement from the Refuge System is now pending before the Marine and Fisheries Committee in the House of Representatives.

a private party to the United States pursuant to an agreement to settle a lawsuit. The city desired to develop the property in accordance with a local development plan. If (*397) transferred, the land would be used as a wildlife refuge, in mitigation for other land involved in the construction of a local highway/flood control project. The city passed an ordinance that imposed certain conditions upon the transfer which would have rendered the land useless as a wildlife refuge. *Id.* at 1215. The Court's discussion of the city's claim has particular relevance to this case.

> The federal government is trying to discharge its obligations under a high priority federal program to protect endangered species. A private landowner wants to donate the land to the government to effectuate these purposes. The City of Chula Vista has passed a local resolution in an attempt to stymie any transfer of the property which it believes does not serve the City's interests, which it has defined as development in strict accordance with its [local development plan].

Id. at 1215.

The Court found that the City's NEPA claim presented "the anomalous situation in which a municipality is trying to use federal environmental laws as a means of protecting a plan for desired local commercial and residential development". *Id.* at 1221. The Court rejected the city's NEPA claim on the grounds that "[i]t would be inconsistent with NEPA's purposes to allow the city to use NEPA to obstruct [the land transfer] which will protect endangered species." *Id.*

In this case, the FWS is attempting to carry out an express mandate from Congress to acquire and protect wetland habitat.

> It is the purpose of this Act to promote, in concert with other Federal and State statutes and programs, the conservation of the wetlands of the Nation ... by (2) intensifying efforts to protect the wetlands of the Nation through acquisition [of wetlands] in fee, easements or other interests . . .

Emergency Wetlands Resources Act of 1986, 16 U.S.C. § 3901(b)(2).

This case also presents the anomalous circumstance of a governmental entity attempting to use the provisions of NEPA to protect its plan to *develop* natural resources in a manner that will unquestionably result in substantial changes in the physical environment. To permit the plaintiffs to use the federal environmental laws to this end and to hinder the FWS's efforts to carry out its directive from Congress would be contrary to the purposes of NEPA and contrary to the FWS's mandate under § 2(b)(2) of the Emergency Wetlands Resources Act.

Plaintiffs lack Standing under NEPA

[6] To have standing to challenge the FWS's action under NEPA, the plaintiffs must show that they have been adversely affected by the FWS's action within the mean-

ing of NEPA. See *Lujan v. National Wildlife Federation*, --- U.S. ----, 110 S.Ct. 3177, 3185-86, 111 L.Ed.2d 695 (1990). In other words, the plaintiffs must establish that the injury of which they complain "falls within the zone of interests sought to be protected by the statutory provision whose violation forms the legal basis of [the] complaint". *Id.* 110 S.Ct. at 3186. The Court's finding that the plaintiffs' claims are not within NEPA's scope and that they are contrary to NEPA's purpose compels the conclusion that the plaintiffs lack standing to assert a claim under NEPA. The plaintiffs' interest in constructing a reservoir is unquestionably an interest that is *subject* to the provisions of NEPA, but it is not an interest that NEPA was designed to protect.

Summary

The Court finds that the FWS's decision not to prepare an EIS concerning the easement acquisition was not arbitrary and capricious; the FWS adequately considered all relevant factors, and there is no clear error in its judgment. *Marsh v. Oregon Natural Resources Council*, 490 U.S. at ---- , 109 S.Ct. at 1861. The FONSI issued by the FWS is correct since there is "no reasonable possibility" that the FWS's action will cause "a significant degradation of some human environmental factor" through a change in the physical environment. *State of Louisiana v. Lee*, 758 F.2d (*398) at 1085. Furthermore, the plaintiffs' claims are not within the scope of NEPA because (1) the alleged effects of the FWS's action lack the requisite causal relationship to any change in the physical environment caused by the acquisition of the easement,

Metropolitan Edison, 460 U.S. at 773, 103 S.Ct. at 1561; and (2) the plaintiffs' claims are an improper attempt to use the provisions of NEPA to hinder the FWS in carrying out its mandate from Congress to acquire and preserve wetland habitat. For these same reasons, the plaintiffs also lack standing to assert a claim under NEPA, since the plaintiffs' alleged injury is not within the "zone of interests" that NEPA was designed to protect.

IV. ADEQUACY OF THE EA

[7] As an alternative to their contention that the FONSI is incorrect, the plaintiffs contend that the EA prepared by the FWS is inadequate in several respects and that the case should be remanded to the FWS for further consideration. The Court has carefully reviewed the EA in light of the administrative record and the applicable law and finds that the EA is adequate.

Preparation of an EA is the proper procedure for an agency to utilize in determining whether to prepare an EIS concerning a proposed action. *Vieux Carre Property Owners, Residents and Associates, Inc. v. Pierce*, 719 F.2d 1272, 1281 (5th Cir.1983); 40 C.F.R. § 1508.9(a)(1). Federal agencies have a duty to prepare a reviewable administrative record, and a court must review the reasonableness of the agency's determination on the basis of the information available to the agency at the time the EA was prepared. *Citizen Advocates for Responsible Expansion, Inc. v. Dole*, 770 F.2d at 433. NEPA does not mandate any particular result of the review process but only requires that federal agencies take a "hard look" at the environmental consequences of a proposed action before such action is undertaken. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, ----

, 109 S.Ct. 1835, 1846, 104 L.Ed.2d 351 (1989). As long as an agency adequately considers the consequences of its proposed action, NEPA does not prohibit the agency from concluding that the benefits of its action outweigh its costs. *Id.* "NEPA merely prohibits uninformed--rather than unwise--agency action." *Id.*

Consideration of the Need for Action

[8] In this case, the FWS selected the land owned by the Club for possible acquisition on the basis of the findings of a biological survey conducted at the FWS's request. (AR. A). The survey identified the Club's land as a particularly valuable site of wetlands habitat, habitat that numerous studies had indicated was rapidly diminishing. (AR. A-IV). The FWS used the findings of the biological survey in compiling the Concept Plan and Land Protection Plan. (AR. C, p. 3). The FWS's reliance

on the survey data to evaluate the importance of acquiring the conservation easement on the Club land was clearly reasonable.

Consideration of Water-Supply Issues

[9] Both the survey and the Concept Plan identified planned reservoir projects as a principal source of conflict with preservation of wetland sites in eastern Texas. (AR. B, p. 133). The survey specifically excluded wetlands sites that might conflict with planned reservoir projects. (AR. A-II). In evaluating the extent of the conflict between wetlands sites and planned reservoir projects, the FWS relied upon the 1984 Texas Water Plan developed by the Texas Department of Water Resources. (AR. H). The FWS's reliance on the Water Plan's data and projections concerning future reservoir projects and water supplies was reasonable in light of the fact that the

Water Plan is "designed to be a state- wide comprehensive estimation of the future water demands and supplies for all of Texas over a 50-year planning period". (Amicus Brief of the State of Texas at p. 8).

Although Waters Bluff was not listed as a planned reservoir in the Water Plan, the FWS nevertheless reviewed the SRA's Master Plan Update which contained SRA's own water supply projections to support its conclusion that Waters Bluff is a feasible and necessary reservoir project. (AR. D, p. (*399) 13, 50; AR. L--N). SRA's Master Plan Update relied on the Water Plan to provide "some of the basic data sources utilized in the projections of future basin water requirements". (AR. M, p. 1-6). The record indicates that the FWS fully considered the available data on future water supply needs of the Sabine River Basin contained in both the Water Plan and SRA's

Master Plan Update. The final EA issued by the FWS contains an adequate discussion of the water-supply issues raised by SRA in its opposition to the proposed easement. (AR. D, p. 12-16).

There is no indication that the FWS failed to consider pertinent data in reaching its conclusion. The plaintiffs merely disagree with the FWS's interpretation of the available data and the conclusion that the FWS reached. Yet "the mere existence of differing opinions does not make [the agency's] decision erroneous." *State of Louisiana v. Lee*, 758 F.2d at 1085. This Court can not conclude that the FWS's review of the water-supply issues raised by SRA was inadequate or that the FWS's conclusion was unreasonable, arbitrary or capricious.

Consideration of Alternatives

[10] The plaintiffs contend that the FWS failed to adequately consider alternatives to acquisition of the easement. The FWS considered four alternatives: (1) taking no action to preserve the Club's land, (2) establishing a refuge in conjunction with the Waters Bluff project, (3) acquiring the Club's land in fee simple, and (4) acquiring a less-than-fee-simple interest in the Club's land. (AR. D, p. 20-25). SRA faults the FWS for not considering the acquisition of high priority wetland habitat outside the area of SRA's Waters Bluff project and for failing to adequately consider establishing a refuge in conjunction with the Waters Bluff project.

Once an agency adequately addresses alternatives to its proposed action, "the decision of which alternative to follow is within the agency's discretion". *South*

Louisiana Environmental Council, Inc. v. Sand, 629 F.2d 1005, 1017 (5th Cir.1980). "[T]he range of alternatives that reasonably must be considered decreases as the environmental impact of the proposed action becomes less and less substantial". *Olmsted Citizens for a Better Community v. United States*, 793 F.2d 201, 208 (8th Cir.1986). Although consideration of some range of alternatives is essential to any environmental assessment, it makes little sense to fault an agency for failing to consider "more environmentally sound alternatives to a project which it has *[properly]* determined, through its decision not to file an impact statement, will have no significant environmental effects anyway". *Id.; see also City of New York v. United States Dept. of Transportation*, 715 F.2d 732, 744 (2nd Cir.1983), *cert. den.*, 465 U.S. 1055, 104 S.Ct. 1403, 79 L.Ed.2d

730 (1984). Since the FONSI concerning acquisition of the easement is correct, the range of alternatives considered by the FWS was adequate.

The FWS considered and rejected the no-action alternative for the simple reason that doing nothing to preserve the highest priority site of wetland habitat would not be consistent with the FWS's preservation efforts and would likely permit the irretrievable loss of the habitat. (AR. D, p. 21). Similarly, establishing a refuge in conjunction with the Waters Bluff project was rejected because that alternative would not prevent destruction of the wetland habitat. (AR. D, p. 20-21). The FWS also concluded that any area set aside for refuge purposes would be of inferior quality. (AR. D, p. 20-21). This conclusion is supported by the report issued by the Texas Parks and Wildlife Department which sug-

gested that wetland sites established in conjunction with reservoir projects are of only "marginal" value to waterfowl populations. (AR. K-I-7, p. 18-19). Acquisition of the Club's land in fee- simple was not an available alternative because the Club was not willing to sell, and the FWS was operating under budgetary constraints that made no-cost acquisitions especially attractive. (AR. D, p. 23-24). The Court finds that the FWS's consideration of these alternative courses of action was adequate and reasonable.

(*400)

Consultation with Other Agencies

[11] The plaintiffs contend that the FWS failed to properly consult with other federal and state agencies during the NEPA review process. This claim is not supported by the evidence in the record, and it is based on the erroneous assumption that NEPA

mandates inter-agency consultation *before* a draft EA is prepared.

Although the applicable regulations do not address the timing of inter-agency consultation in the preparation of an EA, the regulations do provide that after preparing a draft EIS and before preparing a final EIS the agency shall obtain the comments of other Federal agencies and request the comments of appropriate State and local agencies. 40 C.F.R. § 1503.1(a)(1, 2). The regulations further provide that an agency shall respond to such comments. *Id.* at § 1503.4(a). There is nothing in NEPA or the applicable regulations to suggest that the timing of consultations should be any different when an agency prepares a draft EA as opposed to a draft EIS.

The record indicates that the FWS circulated its draft EA to all appropriate federal and state agencies. (AR. D, p. 49-50;

AR. G-84). The FWS then received a number of written comments both critical and supportive of its proposed action. (AR. K). The FWS also received oral and written comments during the public meeting concerning the easement. (AR. I). In response to these comments, the FWS revised its draft EA to include a discussion of the alleged controversial aspects of its acquisition of the easement. (AR. P, p. iii; AR. D, p. iii). While the draft EA contained only a brief reference to SRA's Waters Bluff project, the final EA contains a responsive discussion of the water-supply issues raised by SRA. (AR. P, p. 9; AR. D, p. 12-16). The FWS also revised the EA to address the alternative of establishing a refuge in conjunction with the Waters Bluff project. (AR. P, p. 11-12; AR. D, p. 20). Thus, the record demonstrates that the FWS considered and responded to the comments

raised in opposition to the easement.[8] The FWS's action was consistent with the requirement that an agency involve the public as well as other government agencies in preparing an EA. See 40 C.F.R. § 1501.4(b). That the FWS chose not to agree with the objections raised by SRA and others does not undermine the adequacy of the FWS's NEPA review.

30-Day Comment Period

[12] A related issue raised by the plaintiffs is the FWS's alleged failure to provide a 30-day comment period after the FONSI was issued. *See* 40 C.F.R. § 1501.4(e)(2). This regulation mandates

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[8] The case cited by the plaintiffs in support of their contention is readily distinguishable. In *Simmans v. Grant*, 370 F.Supp. 5, 18-19 (S.D.Tex.1974), the Court found that the federal agency had failed to contact, or to consider the views of, several other agencies in preparing an EA and a FONSI and that there had been little or no opportunity provided for the public to express its views on the agency's proposed action. The record in this case reveals no similar deficiency in the FWS's NEPA review process.

such an additional comment period if the agency's proposed action (1) is, or is closely similar to, action that "normally requires" the preparation of an EIS under regulations adopted by the agency, or (2) "the nature of the action is one without precedent". § 1501.4(e)(2)(i-ii).

Whether the acquisition of the conservation easement is or is similar to an action that "normally requires" the preparation of an EIS under Department of Interior regulations is the subject of somewhat conflicting provisions in those regulations. On the one hand, the regulations provide that an FWS proposal to establish "new refuges, fish hatcheries, or research stations and major additions to existing installations" will "normally require the preparation of an EIS". Department of the Interior Department Manual, 516 DM 6, App. 1, 1.3A(1). The regulations further provide

that if an EIS is not prepared for such proposals, "an EA will be prepared and handled in accordance with § 1501.4(e)(2)". *Id.* at 1.3B. On the other hand, the regulations categorically exclude from the NEPA process "acquisition of land in accordance with the Service's procedures, when acquisition is from a willing seller, the acquisition planning process has been performed (*401) in coordination with the affected public and continuance of essentially the existing use is planned". *Id.* at 516 DM 6, App. 1, 1.4A(4). The resolution of this apparent conflict lies in a common-sense interpretation of these provisions.

Although the effect of the FWS's actions in this case was to create a "new refuge", the other types of actions described in section 1.3A(1) are sufficiently dissimilar to the FWS's action in this case to support the conclusion that the acquisition of a

conservation easement by the FWS is not the "establishment of [a] new refuge [ ]" for purposes of section 1.3A(1). "Establishment of new ... fish hatcheries, research stations and major additions to existing installations" involves more than the mere acquisition of a property interest such as a conservation easement. This interpretation of section 1.3A(1) is thus fully consistent with section 1.4A(4)'s categorical exclusion of land acquisitions by the FWS from a willing seller where a continuation of the existing use of the land is planned--an apt description of the FWS's action in this case. That the FWS prepared an EA concerning the easement acquisition does not undermine this conclusion because the regulations provide that an EA "may be prepared on any action [even those covered by a categorical exclusion] at any time in order to assist planning and decision- mak-

ing". *Id.* at 516 DM 3.2; *see also* 40 C.F.R. § 1508.4. Accordingly, the FWS's action in this case was not one that would normally require the preparation of an EIS under regulations adopted by the FWS, nor was it similar to such an action.

The 30-day comment period must also be provided if "the nature of the proposed action is one without precedent". 40 C.F.R. 1501.4(e)(2)(ii). Whether the "nature" of the FWS's action is "without precedent" is largely a function of the definition one assigns to the term "nature". If, as the plaintiffs argue, the "nature" of the FWS's action is the acquisition of a conservation easement in an area where construction of a reservoir is planned, then the action is "without precedent" since the FWS admits that no other conservation easements have been acquired in an area where a reservoir project is planned. Yet the common under-

standing of the term "nature"--the essential character of something--illustrates that the FWS's action was not "without precedent". The essential character of the FWS's action is the acquisition of a conservation easement under circumstances that pose a conflict with another party's desired uses of the same land. The "nature" of the FWS's action is not "without precedent" since the FWS has heretofore acquired similar easements under circumstances that also posed a conflict with other potential uses of the same land. (AR. D, p. iii). Because the FWS's action was not without precedent, no additional comment period under 40 C.F.R. § 1501.4(e)(2) was required.

Finally, even if the Court were to find that the 30-day comment period applied to the FONSI in this case, the plaintiffs have failed to identify any *additional* relevant information that they or any other party

would have provided the FWS. Accordingly, there is nothing to suggest that the absence of the additional comment period deprived the FWS of relevant information such as would undermine the reasonableness or adequacy of the FWS's NEPA review process.

Consideration of Controversy, Precedent and Cumulative Effects

[13] The plaintiffs also contend that the FWS failed to consider the extent of the controversy surrounding its action, the precedential nature of the action, and the cumulative effects of acquiring additional conservation easements. This claim is based on regulations that provide that in determining whether a proposed action is "significant" under NEPA, the "intensity" or severity of the environmental "impact" of the proposed action must be considered. 40 C.F.R. § 1508.27(b). Among the several factors listed for consideration in deter-

mining "intensity" are the "degree to which the effects on the quality of the human environment are likely to be highly controversial", "the degree to which the action may establish a precedent for future actions with significant effects", and whether the action is related to other actions with (*402) individually insignificant but cumulatively significant impacts". *Id.* at § 1508.27(b)(4, 6, 7).

The only "effects" or "impacts" that must be considered under NEPA, however, are those that have a reasonably close causal relationship to a *change* in the *physical* environment caused by the federal action at issue. *Metropolitan Edison*, 460 U.S. at 773, 103 S.Ct. at 1561. The Court has already found that the alleged effects of the FWS's action in this case--interference with SRA's plans to build Waters Bluff and a risk of future water shortages--lack the

requisite causal relationship because acquisition of the easement *will not* cause any change in the physical environment. Since the alleged effects of the FWS's acquisition of the easement are beyond the scope of NEPA, the factors listed in § 1508.27(b) are of no legal significance to this case, because such factors are only relevant to an evaluation of whether the "effects" of a proposed action are "significant" under NEPA.

The case cited by the plaintiffs, *Sierra Club v. Marsh*, 769 F.2d 868 (1st Cir.1985) does not compel a contrary finding. That case discussed "precedent for future actions with significant effects" in the context of actions taken by an agency that would *encourage* further commercial or industrial development. See *Id.* at 879. Such is not the case here. To the extent that the acquisition of this easement sets

a precedent for acquisitions of additional conservation easements by the FWS, such future actions would not have "significant effects" under NEPA because the acquisition of such easements does not cause any "change in the physical environment".

Summary

Although the plaintiffs disagree with the FWS's evaluation of the data compiled in the NEPA review process as well as the conclusions reached by the FWS, such disagreement is not sufficient to raise a NEPA claim. The purpose of NEPA is to ensure that federal agencies do not make uninformed, as opposed to "unwise", decisions that affect the environment, and so long as an agency adequately considers the consequences of its proposed action, NEPA does not prohibit the agency from concluding that the benefits of its action outweigh its costs. *Robertson v. Methow Valley*

Citizens Council, 490 U.S. at ----, 109 S.Ct. at 1846. The record shows that in this case, the FWS adequately considered the environmental consequences of its action and that is all that NEPA requires.

V. CONCEPT PLAN NOT SUBJECT TO NEPA

[14] The plaintiffs also contend that the FWS should have prepared an EIS concerning the Preservation Program. Unless the Preservation Program is a "proposal" for a major federal action, NEPA does not require the preparation of an EIS. *See Kleppe v. Sierra Club*, 427 U.S. 390, 399, 96 S.Ct. 2718, 2725 (1976); Foundation On Economic Trends v. Lyng, 817 F.2d 882, 885-86 (D.C.Cir.1987). "The mere contemplation of certain action is not sufficient to require an impact statement." *Fritiofson v. Alexander*, 772 F.2d at 1240. Under 40 C.F.R. § 1508.23, a

> [p]roposal exists at the stage in the development of an action when an agency ... has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects [of the proposed action] can be meaningfully evaluated.

After carefully reviewing the Preservation Program as set forth in the FWS's Concept Plan document (AR. B), the Court finds that the Preservation Program is not a "proposal" for major federal action under NEPA.

The plaintiffs characterize the Concept Plan document as a proposal for a series of land acquisitions by the FWS. The alleged effect of this proposal is, once again, the "elimination" of potential reservoir sites. As the Court discussed earlier at length, such effects are not within the scope of NEPA because of the absence of any causal

connection between acquisition of conservation easements and any changes in the physical environment. For this reason alone, the plaintiffs can not maintain a NEPA claim concerning the Preservation (*403) Program. Additionally, a plain reading of the Concept Plan demonstrates that it is nothing more than a preliminary study document that the FWS intends to use as a basis for making specific proposals for land acquisitions in the future.

The FWS's guidelines concerning land acquisitions explain that a concept plan such as the one prepared for the Preservation Program is only a preliminary step in the FWS's decision making process concerning land acquisitions. (FWS Realty Manual, 2 REM 2.10-11).[9] Even after a concept plan is prepared, land acquisitions may be rejected

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[9] Appendix 6, Federal Defendants' Motion for Summary Judgment.

after the FWS conducts further study and planning. *Id.* It is only after such further study and planning that the FWS prepares a "decision document" concerning a specific proposal for land acquisition, and the guidelines provide that such decision documents shall be prepared in accordance with NEPA. Thus, the Preservation Program Concept Plan is not a "proposal" under NEPA, and the statements contained in the Preservation Program Concept Plan support this conclusion.

The majority of the Preservation Program Concept Plan document is simply informational in nature. The Concept Plan contains an extensive discussion of the types of flora and fauna found in bottomlands habitat. (AR. B, pp. 29- 82). There is also an extensive review of the natural resources and socio- economic features of the East Texas area encompassing bottomlands

habitat. (AR. B, pp. 83-123). The statements contained in the document that relate directly to acquisition of bottomlands habitat show that the Concept Plan does not contain a "proposal" for land acquisitions.

> In the Concept Plan, the FWS states that [t]he purpose of this program is to *identify and seek methods for preserving* as much of the remaining bottomlands habitats of east Texas as possible . . . A total of 62 areas of widely varying quality have been identified . . . *Not all of these sites are being recommended for preservation, and other areas may be listed as additional information becomes available.*

(AR. B, p. 4).

The Concept Plan also recites that "[a] stated acreage and policy objective for [preserving] bottomlands in Texas is very difficult, *because of the infancy of the*

program and the complexity of the biological and sociological factors involved." (AR. B, pp. 3-4). Although the Concept Plan divides areas of bottomlands habitat into six priority groups, the Concept Plan specifies that the categories may be subsequently reviewed and revised by the FWS and other parties. (AR. B, p. 22). Finally, the FWS states in the Concept Plan that it has only a "minimal amount" of information concerning the owners of lands that encompass bottomlands habitat, and that only after the FWS contacts landowners will a "detailed preservation plan" be prepared for a specific site. (AR. B, p. 22).

These statements belie the plaintiffs' assertion that the Concept Plan is a "proposal" for federal action. The Concept Plan does not identify which sites will be acquired by the FWS, nor does it identify which of the various suggested alternative

methods of preservation might be used to acquire any particular site or category of sites. Thus, there are no discernible "effects" of any particular acquisition or series of acquisitions that can be meaningfully evaluated under NEPA. Accordingly, the Court finds that the FWS was not required to prepare an EIS concerning the Preservation Program, since the Program is not a "proposal" for major federal action.

VI. NO VIOLATION OF 16 U.S.C. § 460k OR § 742a

[15] In its Original Complaint, SRA alleged that the terms of the easement restricting public access to the Club's property violated provisions of the Fish and Wildlife Act, 16 U.S.C. § 742a, and the Refuge Recreation Act, 16 U.S.C. § 460k. Not only do these statutes fail to provide any basis for SRA's claims, these statutes

specifically authorize the FWS's action in this case.

(*404)

The Fish and Wildlife Act provides in part that

> The Secretary of the Interior is authorized to accept any gifts, devises, or bequests of real or personal property ... for the benefit of the United States Fish and Wildlife Service ... Such acceptance may be subject to the terms of any restrictive or affirmative covenant, or condition of servitude, *if such terms are deemed by the Secretary to be in accordance with law and compatible with the purpose for which acceptance is sought*.

16 U.S.C. § 742f(b)(1).

The Refuge Recreation Act grants the Secretary similar discretion to permit or restrict public use of refuge areas, and to accept donations of real property under

such restrictions as the *Secretary may deem to be compatible with the purposes of the refuge areas.* 16 U.S.C. § 460k. SRA has failed to demonstrate that the FWS's acceptance of the easement under terms restricting the public's access to what remains privately owned land was unreasonable, arbitrary or capricious.

VII. SUMMARY

For the foregoing reasons, the Court finds that (1) the FWS's FONSI concerning the acquisition of the conservation easement is correct because there is "no reasonable possibility" that the FWS's action will cause "a significant degradation of some human environmental factor" through a change in the physical environment; (2) the alleged effect of the FWS's action--"elimination of a potential reservoir site"--is not within the scope of NEPA because there is no causal relationship be-

tween the alleged effect and any change in the physical environment caused by the acquisition of the easement; (3) the plaintiffs lack standing under NEPA to challenge the FWS's acquisition of the easement; (4) the EA prepared by the FWS was adequate; (5) NEPA does not require the FWS to prepare an EIS concerning its Preservation Program, as set forth in the Concept Plan, because the Program is not a "proposal" for a major federal action; and (6) the FWS did not violate the Fish and Wildlife Act or the Refuge Recreation Act by agreeing to accept the easement under terms that restrict the public's access to the Club's property. Therefore, it is

ORDERED the Motions for Summary Judgment filed by the plaintiff Sabine River Authority and plaintiff-intervenor Texas Water Conservation Association are DENIED. It is further

ORDERED the Motions for Summary Judgment filed by the defendants United States Department of Interior and United States Fish and Wildlife Service, Little Sandy Hunting and Fishing Club, and defendant-intervenors Sierra Club and National Audubon Society are GRANTED, and all of the plaintiffs' claims against all of the defendants are DISMISSED WITH PREJUDICE.

APPENDIX A
United States District Court
August 13, 1990

APPENDIX A

United States Department of Interior

FISH AND WILDLIFE SERVICE
POST OFFICE BOX 1306
ALBUQUERQUE, N.M. 87103

DEC 12, 1986

FINDING OF NO SIGNIFICANT IMPACT
(FONSI)

TO ALL INTERESTED GOVERNMENTAL AGENCIES AND PUBLIC GROUPS

Based on a review and evaluation of the information contained in the references enumerated below, I have determined that acceptance of a perpetual non-development easement donation, covering 3,802 acres of privately-owned land in Wood County, Texas, for the benefit of migratory waterfowl and other wildlife, is not a major Federal action which would significantly affect the quality of the human environment within the meaning of Section 102(2)(c) of the National Environmental Policy Act of 1969.

Accordingly, the preparation of an Environmental Impact Statement on the proposed action is not required.

Supporting References

An Environmental Assessment, Texas Bottomland Hardwood Preservation Program Concept Plan and a Bottomland Hardwoods Land Protection Plan have been prepared and summarize the environmental impacts and the reason why a statement is not required. These documents are on file at this office and are available for public inspection upon request.

/s/ M. J. Spear
Regional Director

U.S. COURT OF APPEALS
FILED
MAR 4 1992
GILBERT F. GANUCHEAU
CLERK

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 90-4761

SABINE RIVER AUTHORITY,
Plaintiff-Appellant,
and
TEXAS WATER CONSERVATION ASSOCIATION,
Plaintiff-Intervenor-Appellant,

versus

U. S. DEPARTMENT OF INTERIOR,
et al., Defendants-Appellees,
and
THE SIERRA CLUB and
THE NATIONAL AUDUBON, SOCIETY
Defendants-Intervenors-Appellees

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
TEXAS**

APPENDIX A
5th Circuit Court
March 4, 1992

ON PETITION FOR REHEARING

(March 4, 1992)

Before GOLDBERG, GARWOOD, Circuit Judges and BUCHMEYER* , District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ Irving L. Goldberg
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES FOR STAY OF THE MANDATE

---

* District Judge for the Northern District of Texas, sitting by designation.

APPENDIX A
5th Circuit Court
March 4, 1992

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

TEXAS WATER CONSERVATION ASSOCIATION,
Petitioner
and
SABINE RIVER AUTHORITY

v.

U.S. DEPARTMENT OF INTERIOR, ET AL.
and

THE SIERRA CLUB AND THE NATIONAL AUDUBON SOCIETY, Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. BOOTH *
FRANK R. BOOTH
CAROLYN AHRENS
DAVIDSON, TROILO & BOOTH, P.C.
1900 First City Centre
816 Congress Avenue
Austin, Texas 78701
(512) 478-9506
Counsel for Petitioner
Texas Water Conservation Association

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APPENDIX B

16 U.S.C. § 460k (1974)

NATIONAL CONSERVATION RECREATIONAL AREAS

§ 460k. Public recreation use of fish and wildlife conservation areas; compatibility with conservation purposes; appropriate incidental or secondary use; consistency with other Federal operations and primary objectives of particular areas; curtailment; forms of recreation not directly related to primary purposes of individual areas; repeal or amendment of provisions for particular areas.

In recognition of mounting public demands for recreational opportunities on areas within the National Wildlife Refuge System, national fish hatcheries, and other conservation areas administered by the Secretary

of the Interior for fish and wildlife purposes; and in recognition also of the resulting imperative need, if such recreational opportunities are provided, to assure that any present or future recreational use will be compatible with, and will not prevent accomplishment of, the primary purposes for which the said conservation areas were acquired or established, the Secretary of the Interior is authorized, as an appropriate incidental or secondary use, to administer such areas or parts thereof for public recreation when in his judgment public recreation can be an appropriate incidental or secondary use: *Provided*, That such public recreation use shall be permitted only to the extent that is practicable and not inconsistent with other previously authorized Federal operations or with the primary objectives for which each particular area is established:

Provided further, That in order to insure accomplishment of such primary objectives, the Secretary, after consideration of all authorized uses, purposes, and other pertinent factors relating to individual areas, shall curtail public recreation use generally or certain types of public recreation use within individual areas or in portions thereof whenever he considers such action to be necessary: *And provided further*, That none of the aforesaid refuges, hatcheries, game ranges, and other conservation areas shall be used during any fiscal year for those forms of recreation that are not directly related to the primary purposes and functions of the individual areas until the Secretary shall have determined--

(a) that such recreational use will not interfere with the primary purposes for which the areas were established, and

(b) that funds are available for the development, operation, and maintenance of these permitted forms of recreation. This section shall not be construed to repeal or amend previous enactments relating to particular areas.

(Pub.L. 87-714, § 1, Sept. 28, 1962, 76 Stat. 653; Pub.L. 89-669, § 9, Oct. 15, 1966, 80 Stat. 930.)

APPENDIX B

16 U.S.C. § 668dd (1985)

§ 668dd. National Wildlife Refuge System

(a) Designation; administration; continuance of resources-management-programs for refuge lands in Alaska; disposal of acquired lands; proceeds

(1) For the purpose of consolidating the authorities relating to the various categories of areas that are administered by the Secretary of the Interior for the conservation of fish and wildlife, including species that are threatened with extinction, all lands, waters, and interests therein administered by the Secretary as wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas are

hereby designated as the "National Wildlife Refuge System" (referred to herein as the "System"), which shall be subject to the provisions of this section, and shall be administered by the Secretary through the United States Fish and Wildlife Service. With respect to refuge lands in the State of Alaska, those programs relating to the management of resources for which any other agency of the Federal Government exercises administrative responsibility through cooperative agreement shall remain in effect, subject to the direct supervision of the United States Fish and Wildlife Service, as long as such agency agrees to exercise such responsibility.

(2) No acquired lands which are or become a part of the System may be transferred or otherwise disposed of under any provision of law (except by exchange pursuant to subsection (b) (3) of this section) unless-

(A) the Secretary of the Interior determines with the approval of the Migratory Bird Conservation Commission that such lands are no longer needed for the purposes for which the System was established; and

(B) such lands are transferred or otherwise disposed of for an amount not less than--

(i) the acquisition costs of such lands, in the case of lands of the System which were purchased by the United States with funds from the migratory bird conservation fund, or fair market value, whichever is greater; or

(ii) the fair market value of such lands (as determined by the Secretary as of the date of the transfer or disposal), in the case of lands of the

System which were donated to the System.

The Secretary shall pay into the migratory bird conservation fund the aggregate amount of the proceeds of any transfer or disposal referred to in the preceding sentence.

(3) Each area which is included within the System on January 1, 1975, or thereafter, and which was or is--

(A) designated as an area within such System by law, Executive order, or secretarial order; or

(B) so included by public land withdrawal, donation, purchase, exchange, or pursuant to a cooperative agreement with any State or local government, any Federal department or agency, or any other governmental entity,

shall continue to be a part of the System until otherwise specified by Act of

Congress, except that nothing in this paragraph shall be construed as precluding-

(i) the transfer or disposal of acquired lands within any such area pursuant to paragraph (2) of this subsection;

(ii) the exchange of lands within any such area pursuant to subsection (b) (3) of this section; or

(iii) the disposal of any lands within any such area pursuant to the terms of any cooperative agreement referred to in subparagraph (B) of this paragraph.

(b) Administration; public accommodations con-tracts; acceptance and use of funds; exchange of properties; cash equalization payments

In administering the System, the Secretary is authorized--

(1) to enter into contracts with any person or public or private agency through negotiation for the provision of public accommodations when, and in such locations, and to the extent that the Secretary determines will not be inconsistent with the primary purpose for which ~~the~~ affected area was established.

(2) to accept donations of funds and to use such funds to acquire or manage lands or interests therein, and

(3) to acquire lands or interests therein by exchange (A) for acquired lands or public lands, or for interests in acquired or public lands, under his jurisdiction which he finds to be suitable for disposition, or (B) for the right to remove, in accordance with such terms and conditions as he may prescribe, products from the acquired or public lands within the System. The values of

the properties so exchanged either shall be approximately equal, or if they are not approximately equal the values shall be equalized by the payment of cash to the grantor or to the Secretary as the circumstances require.

(c) Prohibited and permitted activities; application of mining and mineral leasing laws, hunting or fishing regulations, and State laws or regulations

No person shall knowingly disturb, injure, cut, burn, remove, destroy, or possess any real or personal property of the United States, including natural growth, in any area of the System; or take or possess any fish, bird, mammal, or other wild vertebrate or invertebrate animals or part or nest or egg thereof within any such area; or enter, use, or otherwise occupy any such area for any purpose; unless such activi-

ties are performed by persons authorized to manage such area, or unless such activities are permitted either under subsection (d) of this section or by express provision of the law, proclamation, Executive order, or public land order establishing the area, or amendment thereof: *Provided*, That the United States mining and mineral leasing laws shall continue to apply to any lands within the System to the same extent they apply prior to October 15, 1966, unless subsequently withdrawn under other authority of law. With the exception of endangered species and threatened species listed by the Secretary pursuant to section 1533 of this title in States wherein a cooperative agreement does not exist pursuant to section 1535(c) of this title, nothing in this Act shall be construed to authorize the Secretary to control or regulate hunting or fishing of resident fish and

wildlife on lands not within the system. The regulations permitting hunting and fishing of resident fish and wildlife within the System shall be, to the extent practicable, consistent with State fish and wildlife laws and regulations. The provisions of this Act shall not be construed as affecting the authority, jurisdiction, or responsibility of the several States to manage, control, or regulate fish and resident wildlife under State law or regulations in any area within the System.

(d) Use of areas; administration of migratory bird sanctuaries as game taking areas; rights of way, easements, and reservations; payment of fair market value

(1) The Secretary is authorized, under such regulations as he may prescribe, to--

(A) permit the use of any area within the System for any purpose, in-

cluding but not limited to hunting, fishing, public recreation and accommodations, and access whenever he determines that such uses are compatible with the major purposes for which such areas were established: Provided, That not to exceed 40 per centum at any one time of any area that has been, or hereafter may be acquired, reserved, or set apart as an inviolate sanctuary for migratory birds, under any law, proclamation, Executive order, or public land order may be administered by the Secretary as an area within which the taking of migratory game birds may be permitted under such regulations as he may prescribe unless the Secretary finds that the taking of any species of migratory game birds in more than 40 percent of such area would be beneficial to the species; and

(B) permit the use of, or grant easements in, over, across, upon, through, or under any areas within the System for purposes such as but not necessarily limited to, powerlines, telephone lines, canals, ditches, pipelines, and roads, including the construction, operation, and maintenance thereof, whenever he determines that such uses are compatible with the purposes for which these areas are established.

(2) Notwithstanding any other provision of law, the Secretary of the Interior may not grant to any Federal, State, or local agency or to any private individual or organization any right-of-way, easement, or reservation in, over, across, through, or under any area within the system in connection with any use permitted by him under paragraph (1) (B) of this subsection unless the grantee pays to the Secretary, at the

option of the Secretary, either (A) in lump sum the fair market value (determined by the Secretary as of the date of conveyance to the grantee) of the right-of-way, easement, or reservation; or (B) annually in advance the fair market rental value (determined by the Secretary) of the right-of-way, easement, or reservation. If any Federal, State, or local agency is exempted from such payment by any other provision of Federal law, such agency shall otherwise compensate the Secretary by any other means agreeable to the Secretary, including, but not limited to, making other land available or the loan of equipment or personnel; except that (A) any such compensation shall relate to, and be consistent with, the objectives of the National Wildlife Refuge System, and (B) the Secretary may waive such requirement for compensation if he finds such requirement impracticable or un-

necessary. All sums received by the Secretary of the Interior pursuant to this paragraph shall, after payment of any necessary expenses incurred by him in administering this paragraph, be deposited into the Migratory Bird Conservation Fund and shall be available to carry out the provisions for land acquisition of the Migratory Bird Conservation Act (16 U.S.C. 715 et seq.) and the Migratory Bird Hunting Stamp Act (16 U.S.C. 718 et seq.).

(e) Penalties

Any person who violates or fails to comply with any of the provisions of this Act or any regulations issued thereunder shall be fined under Title 18, or imprisoned for not more than 1 year, or both.

(f) Enforcement of provisions; arrest, searches, and seizures; custody of property; forfeitures; disposition

Any person authorized by the Secretary of the Interior to enforce the provisions of this Act or any regulations issued thereunder, may, without a warrant, arrest any person violating this Act or regulations in his presence or view, and may execute any warrant or other process issued by an officer or court of competent jurisdiction to enforce the provisions of this Act or regulations, and may with a search warrant search for and seize any property, fish, bird, mammal, or other wild vertebrate or invertebrate animals or part or nest or egg thereof, taken or possessed in violation of this Act or the regulations issued thereunder. Any property, fish, bird, mammal, or other wild vertebrate or invertebrate animals or part or egg thereof seized with or without a search warrant shall be held by such person or by a United States marshal, and upon conviction, shall be forfeited to

the United States and disposed of by the Secretary, in accordance with law. The Director of the United States Fish and Wildlife Service is authorized to utilize by agreement, with or without reimbursement, the personnel and services of any other Federal or State agency for purposes of enhancing the enforcement of this Act.

(g) Regulations; continuation, modification, or rescission

Regulations applicable to areas of the System that are in effect on October 15, 1966, shall continue in effect until modified or rescinded.

(h) National conservation recreational area provisions; amendment, repeal, or modification

Nothing in this section shall be construed to amend, repeal, or otherwise modify the provision of the Act of September 28, 1962 (76 Stat. 653; 16 U.S.C. 460k-

460k-4) which authorizes the Secretary of the Interior to administer the areas within the System for public recreation. The provisions of this section relating to recreation shall be administered in accordance with the provisions of said sections.

(i) Exemption from State water laws

Nothing in this Act shall constitute an express or implied claim or denial on the part of the Federal Government as to exemption from State water laws.

(Pub.L. 89-669, § 4, Oct. 15, 1966, 80 Stat. 927; Pub.L. 90-404, § 1, July 18, 1968, 82 Stat. 359; Pub.L. 93-205, § 13(a), Dec. 28, 1973, 87 Stat. 902; Pub.L. 93-509, § 2, Dec. 3, 1974, 88 Stat. 1603; Pub.L. 94-215, § 5, Feb. 17, 1976, 90 Stat. 190; Pub.L. 94-223, Feb. 27, 1976, 90 Stat. 199; Pub.L. 95- 616, §§ 3(f), 6, Nov. 8, 1978, 92 Stat. 3111, 3114.) (As amended Pub.L. 100-226, § 4, Dec. 31, 1987,

101 Stat. 1551; Pub.L. 100- 653, Title IX, § 904, Nov. 14, 1988, 102 Stat. 3834.)

APPENDIX B

28 U.S.C. § 1254 (Supp. 1992)

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the

entire record to be sent up for decision of the entire matter in controversy.

(As amended June 27, 1988, Pub.L. 100-352, § 2(a), (b), 102 Stat. 662.)

APPENDIX B

33 U.S.C. § 1371 (1976)

§ 1371. Authority under other laws and regulations

(a) Impairment of authority or functions of officials and agencies; treaty provisions

This chapter shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this chapter; (2) affecting or impairing the authority of the Secretary of the Army (A) to maintain navigation or (B) under the Act of March 3, 1899 (30 Stat. 1112); except that any permit issued under section 1344 of this title shall be conclusive as to the effect on water quality of any discharge resulting from any activity subject to section 403 of this title, or (3) affecting or impairing the

provisions of any treaty of the United States.

(b) Discharges of pollutants into navigable waters

Discharges of pollutants into the navigable waters subject to the Rivers and Harbors Act of 1910 (36 Stat. 593; 33 U.S.C. 421) and the Supervisory Harbors Act of 1888 (25 Stat. 209; 33 U.S.C. 441-451b) shall be regulated pursuant to this chapter, and not subject to such Act of 1910 and the Act of 1888 except as to effect on navigation and anchorage.

(c) Action of Administrator deemed major Federal action; construction of National Environmental Policy Act of 1969

(1) Except for the provision of Federal financial assistance for the purpose of assisting the construction of publicly owned treatment works as authorized by section

1281 of this title, and the issuance of a permit under section 1342 of this title for the discharge of any pollutant by a new source as defined in section 1316 of this title, no action of the Administrator taken pursuant to this chapter shall be deemed a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969 (83 Stat. 852) [42 U.S.C.A. s 4321 et seq.]; and

(2) Nothing in the National Environmental Policy Act of 1969 (83 Stat. 852) shall be deemed to--

(A) authorize any Federal agency authorized to license or permit the conduct of any activity which may result in the discharge of a pollutant into the navigable waters to review any effluent limitation or other requirement established pursuant to this chapter or the adequacy

of any certification under section 1341 of this title; or

(B) authorize any such agency to impose, as a condition precedent to the issuance of any license or permit, any effluent limitation other than any such limitation established pursuant to this chapter.

(d) Consideration of international water pollution control agreements

Notwithstanding this chapter or any other provision of law, the Administrator (1) shall not require any State to consider in the development of the ranking in order of priority of needs for the construction of treatment works (as defined in subchapter II of this chapter), any water pollution control agreement which may have been entered into between the United States and any other nation, and (2) shall not con-

sider any such agreement in the approval of any such priority ranking.

(June 30, 1948, c. 758, Title V, s 511, as added Oct. 18, 1972, Pub.L. 92- 500, s 2, 86 Stat. 893, and amended Jan. 2, 1974, Pub.L. 93-243, s 3, 87 Stat. 1069.)

APPENDIX B

42 U.S.C. § 4331 (1977)

§ 4331. Congressional declaration of national environmental policy

Creation and maintenance of conditions under which man and nature can exist in productive harmony

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public

and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

Continuing responsibility of Federal Government to use all practicable means to improve and coordinate Federal plans, functions, programs, and resources

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal

plans, functions, programs, and resources to the end that the Nation may--

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit

high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

Responsibility of each person to contribute to preservation and enhancement of environment

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

(Pub.L. 91-190, Title I, § 101, Jan. 1, 1970, 83 Stat. 852.)

APPENDIX B

42 U.S.C. § 4332 (1977)

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the

Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the pub-

lic as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reasons of having been prepared by a State agency or official, if:

(i) the State agency of official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of

statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information use-

[1] So in original.

ful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

Pub.L. 91-190, Title I, § 102, Jan. 1, 1970, 83 State. 853; Pub.L. 94-83, Aug. 9, 1975, 89 Stat. 424.

APPENDIX B

EXCERPTS FROM
40 C.F.R. Part 1501 (1986)

PART 1501:--NEPA AND AGENCY PLANNING

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609, and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55992, Nov. 29, 1978, unless otherwise noted.

* * * *

§ 1501.2 Apply NEPA early in the process.

Agencies shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to

head off potential conflicts. Each agency shall:

(a) Comply with the mandate of section 102(2)(A) to "utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment," as specified by § 1507.2.

(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents.

(c) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves

unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of the Act.

(d) Provide for cases where actions are planned by private applicants or other non-Federal entities before Federal involvement so that:

(1) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(2) The Federal agency consults early with appropriate State and local agencies and Indian tribes and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(3) The Federal agency commences its NEPA process at the earliest possible time.

* * * *

§ 1501.6 Cooperating agencies.

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition to any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with

jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest possible time.

(2) Participate in the scoping process (described below in § 1501.7).

(3) Assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.

(4) Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.

(5) Normally use its own funds. The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall including such funding requirements in their budget requests.

(c) A cooperating agency may in response to a lead agency's request for assistance in preparing the environmental impact statement (described in paragraph (b)(3), (4), or (5) of this section) reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement. A copy of this reply shall be submitted to the Council.

* * * *

APPENDIX B

EXCERPTS FROM
40 CFR Part 1502 (1986)

PART 1502:--ENVIRONMENTAL IMPACT STATEMENT

AUTHORITY: NEPA, the Environmental Quality Improve-ment Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

* * * *

§ 1502.5 Timing.

An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (§ 1508.23) so that preparation can be completed in time for the final statement to

be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made (§§ 1500.2(c), 1501.2, and 1502.2). For instance:

(a) For projects directly undertaken by Federal agencies the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary.

(b) For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. Federal agencies are encourage to begin preparation of such assessments or

statements earlier, preferably jointly with applicable State or local agencies.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances the statement may follow preliminary hearings designed to gather information for use in the statements.

(d) For informal rulemaking the draft environmental impact statement shall normally accompany the proposed rule.

APPENDIX B

EXCERPTS FROM
40 C.F.R. Part 1508 (1986)

PART 1508:--TERMINOLOGY AND INDEX

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56003, Nov. 29, 1978, unless otherwise noted.

* * * *

§ 1508.5 Cooperating agency.

"Cooperating agency" means any Federal agency other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the

quality of the human environment. The selection and responsibilities of a cooperating agency are described in § 1501.6. A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.

* * * *

§ 1508.7 Cumulative impact.

"Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

* * * *

§ 1508.8 Effects.

"Effects" include:

(a) Direct effects, which are caused by the action and occur at the same time and place.

(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, struc-

tures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

* * * *

§ 1508.14 Human environment.

"Human environment" shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of "effects" (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statements . When an environmental impact statement is prepared and economic or so-

cial and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.

* * * *

§ 1508.18 Major Federal action.

"Major Federal action" includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as acency action.

(a) Actions include new and continuing activities, including projects and programs

entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.*, with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following catagories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*;

treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographical area. Projects include actions approved by permit

or other regulatory decision as well as federal and federally assisted activities.

* * * *

§ 1508.23 Proposal.

"Proposal" exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated. Preparation of an environmental impact statement on a proposal should be timed (§ 1502.5) so that the final statemment may be completed in time for the statement to be included in any recommendation or report on the proposal. A proposal may exist in fact as well as by agency declaration that one exists.

* * * *

§ 1508.27 Significantly.

"Significantly" as used in NEPA requires considerations of both context and intensity:

(a) *Context.* This means that the significance of the action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity.* This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geogrpahic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with

significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been deter-

mined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

[43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

TEXAS WATER CONSERVATION ASSOCIATION,
Petitioner
and
SABINE RIVER AUTHORITY

v.

U.S. DEPARTMENT OF INTERIOR, ET AL.
and

THE SIERRA CLUB AND THE NATIONAL AUDUBON SOCIETY, Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. BOOTH *
FRANK R. BOOTH
CAROLYN AHRENS
DAVIDSON, TROILO & BOOTH, P.C.
1900 First City Centre
816 Congress Avenue
Austin, Texas 78701
(512) 478-9506
Counsel for Petitioner
Texas Water Conservation Association

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APPENDIX C

TEXAS CONSTITUTION, art. III, § 49-d (1984)

§ 49-d. Acquisition and development of water storage facilities; filtration, treatment and transportation of water; enlargement of reservoirs

Sec. 49-d. It is hereby declared to be the policy of the State of Texas to encourage the optimum development of the limited number of feasible sites available for the construction or enlargement of dams and reservoirs for conservation of the public waters of the state, which waters are held in trust for the use and benefit of the public. The proceeds from the sale of the additional bonds authorized hereunder deposited in the Texas Water Development Fund and the proceeds of bonds previously authorized by Article III, Section 49-c of this Constitution, may be used by the Texas

Water Development Board, under such provisions as the Legislature may prescribe by General Law, including the requirement of a permit for storage or beneficial use, for the additional purposes of acquiring and developing storage facilities, and any system or works necessary for the filtration, treatment and transportation of water from storage to points of treatment, filtration and/or distribution, including facilities for transporting water therefrom to wholesale purchasers, or for any one or more of such purposes or methods; provided, however, the Texas Water Development Fund or any other state fund provided for water development, transmission, transfer or filtration shall not be used to finance any project which contemplates or results in the removal from the basin of origin of any surface water necessary to supply the reasonably foreseeable future water require-

ments for the next ensuing fifty-year period within the river basin of origin, except on a temporary, interim basis.

Under such provisions as the Legislature may prescribe by General Law the Texas Water Development Fund may be used for the conservation and development of water for useful purposes by construction or reconstruction or enlargement of reservoirs constructed or to be constructed or enlarged within the State of Texas or on any stream constituting a boundary of the State of Texas, together with any system or works necessary for the filtration, treatment and/or transportation of water, by any one or more of the following governmental agencies: by the United States of America or any agency, department or instrumentality thereof; by the State of Texas or any agency, department or instrumentality thereof; by political subdivisions or bod-

ies politic and corporate of the state; by interstate compact commissions to which the State of Texas is a party; and by municipal corporations. The Legislature shall provide terms and conditions under which the Texas Water Development Board may sell, transfer or lease, in whole or in part, any reservoir and associated system or works which the Texas Water Development Board has financed in whole or in part.

Under such provisions as the Legislature may prescribe by General Law, the Texas Water Development Board may also execute long-term contracts with the United States or any of its agencies for the acquisition and development of storage facilities in reservoirs constructed or to be constructed by the Federal Government. Such contracts when executed shall constitute general obligations of the State of Texas in the same manner and with the same effect as

state bonds issued under the authority of the preceding Section 49-c of this Constitution, and the provisions in said Section 49-c with respect to payment of principal and interest on state bonds issued shall likewise apply with respect to payment of principal and interest required to be paid by such contracts. If storage facilities are required for a term of years, such contracts shall contain provisions for renewal that will protect the state's investment.

The aggregate of the bonds authorized hereunder shall not exceed $200,000,000 and shall be in addition to the aggregate of the bonds previously authorized by said Section 49-c of Article III of this Constitution. The Legislature upon two-thirds (2/3) vote of the elected members of each House, may authorize the Board to is-

sue all or any portion of such $200,000,000 in additional bonds herein authorized.

The Legislature shall provide terms and conditions for the Texas Water Development Board to sell, transfer or lease, in whole or in part, any acquired storage facilities or the right to use such storage facilities together with any associated system or works necessary for the filtration, treatment or transportation of water at a price not less than the direct cost of the Board in acquiring same; and the Legislature may provide terms and conditions for the Board to sell any unappropriated public waters of the state that might be stored in such facilities. As a prerequisite to the purchase of such storage or water, the applicant therefor shall have secured a valid permit from the Texas Water Commission or its successor authorizing the acquisition of such storage facilities or the water im-

pounded therein. The money received from any sale, transfer or lease of storage facilities or associated system or works shall be used to pay principal and interest on state bonds issued or contractual obligations incurred by the Texas Water Development Board, provided that when moneys are sufficient to pay the full amount of indebtedness then outstanding and the full amount of interest to accrue thereon, any further sums received from the sale, transfer or lease of such storage facilities or associated system or works may be used for the acquisition of additional storage facilities or associated system or works or for providing financial assistance as authorized by said Section 49-c. Money received from the sale of water, which shall include standby service, may be used for the operation and maintenance of ac-

quired facilities, and for the payment of principal and interest on debt incurred.

Should the Legislature enact enabling laws in anticipation of the adoption of this Amendment, such Acts shall not be void by reason of their anticipatory character. Adopted Nov. 6, 1962. Amended Nov. 8, 1966.

APPENDIX C

TEXAS WATER CODE ANNOTATED § 15.004 (1988)

Water Development
Water Assistance Program

§ 15.004. Transbasin Diversion

Money on deposit in a fund created under Article III, Section 49-d-3, of the Texas Constitution shall not be used to finance or in aid of any project under this chapter that contemplates or results in the removal from the basin of origin of any surface water necessary to supply the reasonably foreseeable future water requirements for the next ensuing 50-year period within the river basin of origin, except on a temporary, interim basis.

Added by Acts 1981, 67th Leg., 1st C.S., p. 102, ch. 12, § 1, eff. Nov. 10, 1981. Amended by Acts 1985, 69th Leg., ch. 133, § 2.03.

APPENDIX C

TEXAS WATER CODE ANN. § 16.051 (1988)
Water Development - Planning

§ 16.051. State Water Plan

(a) The executive administrator shall prepare, develop, and formulate a comprehensive state water plan.

(b) The plan shall define and designate river basins and watersheds as separate units for the purpose of water development and interwatershed transfers.

(c) The executive administrator shall be governed in his preparation of the plan by a regard for the public interest of the entire state. The executive administrator shall direct his efforts toward the orderly development and management of water resources in order that sufficient water will be available at a reasonable cost to further the economic development of the entire state.

(d) The executive administrator shall also give consideration in the plan to the effect of upstream development on the bays, estuaries, and arms of the Gulf of Mexico and to the effect of the plan on navigation.

Amended by Acts 1977, 65th Leg., p. 2207, ch. 870, § 1, eff. Sept. 1, 1977; Acts 1985, 69th Leg., ch. 795, § 1.046, eff. Sept. 1, 1985.

APPENDIX C

Texas Water Code § 16.052 (1988)

Water Development
Water Assistance Program

§ 16.052. Interbasin Water Transfer

The executive administrator shall not prepare or formulate a plan which contemplates or results in the removal of surface water from the river basin of origin if the water supply involved will be required for reasonable foreseeable water supply requirements within the river basin or origin during the next ensuing 50-year period, except on a temporary, interim basis.

Amended by Acts 1977, 6th Leg., p. 2207, ch. 870, § 1, eff. Sept. 1, 1977; Acts 1985, 69th Leg., ch. 795, § 1.047, eff. Sept. 1, 1985.

APPENDIX C

FISH & WILDLIFE SERVICES (Prodedural Manual)
NEPA HANDBOOK - INTRA-SERVICE PLANNING AND DOCUMENTATION (excerpt)

3.9 NEPA Procedural Requirements

A. Phase 1: Determination of the Type of NEPA Documentation Required (Exhibit 2).

The basic question under NEPA is: "Is the action a major Federal action having a significant impact on the quality of the human environment?" If the answer is yes, then an Environmental Impact Statement (EIS) is required. Any action with significant effects is considered a major Federal action for purposes of NEPA compliance. If the action is a categorical exclusion, then no documentation is required. On all other actions, an Environmental Assessment (EA) must be prepared to help determine whether there should be an EIS. After completion of an EA, if it is determined that an EIS

is not required, a Finding of No Significant Impact (FONSI) will be prepared. If there is no question that an EIS must be prepared, the EA step may be bypassed and the EIS process may be started directly.

(1) Categorical Exclusions. Actions listed in 516 DM 2 Appendix 1 and 516 DM 6 Appendix 1 (30 AM 2 Exhibit 4) have been determined not to affect the quality of the human environment individually or cumulatively and, therefore, they do not normally require preparation of either an EA or EIS. If circumstances exist in which a normally excluded action may result in significant effects upon the environment an EA or EIS must b e prepared. In addition, an EA may be prepared if it is determined that such preparation would: aid in planning or decisionmaking serve as a vehicle to gain

public input or facilitate interagency coordination, simplify permit approval, or gain other necessary legal clearances.

(2) EIS Required. Potential FWS actions which always require the completion of an EIS prior to their implementation are listed in 516 DM 6 Appendix 1. As with the categorical exclusions, circumstances may exist in which an action normally requiring the preparation of an EIS would not require one. In such circumstances, a field office shall prepare a statement explaining why the particular action in question does not require preparation of an EIS and forward this to the decisionmaker identified in 4 AM 4. This statement normally would be in the form of an EA plus other supporting information.

(3) Environmental Assessment Required. If an action is not categorically excluded

or listed as requiring an EIS, an EA must be prepared unless a decision has been made to proceed directly with preparation of an EIS. A purpose of the EA is to help determine if the action will have significant effects. If the EA shows there are significant effects, an EIS must be prepared. The major decision points normally requiring an EIS are listed in 516 DM 6 Appendix 1.

B. Phase 2: The Documentation Process (Exhibit 3). As explained above, three different determinations of need for NEPA documentation can be made (i.e., action is categorically excluded, EA is required, or EIS is required). This section reflects those three options.

(1) Actions Categorically Excluded. If this determination is made, the action may be implemented immediately; no NEPA docu-

mentation is required, nor is there a requirement to record this decision for all actions. However, for convenience and for reference purposes it may be desirable to prepare a brief paragraph for the administrative record stating that the action was examined from a NEPA standpoint and was found to be a categorically excluded type of action. Both the Department of the Interior (DOI) and FWS have established lists of categorically excluded actions; see 516 DM 2 Appendix 1 and 516 DM 6 Appendix 1 (included as Exhibit 4 of 30 AM 2 of this Handbook).

* * * *

(3) EA Required - Prepare EA. If the action is not categorically excluded or certain to be covered by an EIS, the preparation of an EA should begin immediately. The substantive requirements of EA prepara-

tion are described in 30 AM 3.10A. As mentioned earlier, an EA can serve a variety of purposes in addition to its primary legal purpose of assisting in determination of need to prepare an EIS. Nothing precludes FWS from utilizing the EA as a tool for public participation or interagency coordination, assisting in securing permits or other legal clearances, or aiding planning and decisionmaking. These other purposes (e.g., planning) may make the EA more comprehensive in what it includes beyond what is necessary for the EIS or no-EIS determination.

(a) Distribute EA for Review and Comment. For actions proposed to occur in a wetland or 100-year floodplain, circulation of EA's is required (See 30 AM 11).

(i) Interested and affected public entities shall be notified by notice in the

Federal Register or other appropriate medium that an EA has been prepared and is available for review. Use of an EA in this manner can have several benefits. Comments received may reveal different alternative means to accomplish stated purpose, yet with reduced environmental harm. New mitigative measures to offset adverse effects may be noted. Additionally, groups or individuals may offer assistance or support in implementing an action. The public review and comment process also provides an indication of the degree of public controversy surrounding an issue; if a determination is made not to pursue preparation of an EIS, a written record of public comment supports such a judgment.

(b) Finalize EA. Comments made during in-house review (or by the public or other agencies if EA was distributed outside FWS)

must be considered in revising the EA to define alternatives further, including the proposed action, and for better assessment of effects. Feasible mitigative measures will be identified during review of the draft EA in accordance with the FWS Mitigation Policy (see 30 AM 4 Exhibit 2), and will be made part of the proposed action.

(c) Determine if the Preferred Alternative Constitutes a Major Action Significantly Affecting the Quality of the Human Environment. The EA shall serve as the basis for determining whether implementation of the proposed action would constitute a major Federal action significantly affecting the quality of the human environment. This determination is the second major decision point in the NEPA process. If a positive finding is made, an EIS is re-

quired. If a negative finding is made, a FONSI must be prepared and signed. Either finding will be based on information presented in the text of the EA and the text of the EA should provide sufficient factual material to support the finding.

(i) Determinations of major Federal actions and significant effects upon the human environment are subject to variable interpretation, and no hard-and-fast rules are available to label an action conclusively one way or the other. The necessity for preparing an EIS is a matter of professional judgment requiring consideration of all issues in question, including information documented in the EA. The suggested criteria below are developed from review of legal opinions rendered during the past several years and from guidance provided by CEQ in 40 CFR 1508.18 and 1508.27.

(d) Criteria To Assist In Determination Of The Need To Prepare An EIS. The following criteria should be used in evaluating proposed actions which may require an EIS. It is important to be as objective as possible when making these determinations. One or more of the following, depending on the severity of effects, may trigger the preparation of an EIS to assure that adequate information is available before decisions are made.

(i) Controversial environmental effects.

(ii) Change in FWS policy having a significant environmental effect.

(iii) Precedent-setting actions with wide-reaching or long-term implications (e.g., special use permits for off-road vehicles, mineral extraction, energy facility development).

(iv) Obligation of future generations to large monetary debts or to social or technological solutions to problems now considered insurmountable.

(v) Major alterations in natural environmental quality, either exceeding local, regional, State, or Federal environmental standards, or exposing existing or future generations to increased safety or health hazards.

(vi) Conflicts with proposed or adopted local, regional, State, interstate, or Federal land use plans or policies.

(vii) Adverse effects on designated or proposed natural or recreation areas (e.g., wilderness areas, parks, research natural areas, wild and scenic rivers, estuarine sanctuaries, national recreation areas, critical habitat, or wetlands).

(viii) Degradation of important aesthetic resources.

(ix) Removal from production of prime or unique farmland as designated by local, regional, State, or Federal authorities.

(x) Major geologic, hydrologic, or meteorologic changes.

(xi) Construction or other activities within an area of significant geologic or hydrologic hazard (e.g., within a major earthquake zone, an area that is landslide prone, or a 100-year floodplain).

(xii) Major effects on a domestic water supply, or a major consumptive or long-term commitment to water use.

(xiii) Major consumptive or long-term commitments to sue of energy or nonrenewable resources, especially those of non-local origin or in short supply.

(xiv) Major effects on energy sources, existing or potential (e.g., oil, gas, coal, uranium, geothermal, or hydropower resources).

(xv) Condemnation of property rights or fee title to land, and/or large-scale relocation of people, homes, commercial, industrial, or major public facilities.

(3) Prepare Finding of No Significant Impact (40 CFR 1508.13). If it is determined that implementation of a proposed action would not constitute a major Federal action significantly affecting the quality of the human environment, FONSI, explaining the rationale for such finding and stating that an EIS will not be prepared, shall be prepared and signed by the RD and made available to all interested parties for public review. A FONSI must be made available to the public in accordance with 40

CFR 1506.6. An example of a FONSI is found in Exhibit 4.

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3.9B(2)

(d) Criteria To Assist In Determination Of The Need To Prepare An EIS. The following criteria should be used in evaluating proposed actions which may require an EIS. It is important to be as objective as possible when making these determinations. One or more of the following, depending on the severity of effects, may trigger the preparation of an EIS to assure that adequate information is available before decisions are made.

(i) Controversial environmental effects.

(ii) Change in FWS policy having a significant environmental effect.

(iii) Precedent-setting actions with wide-reaching or long-term implications

(e.g., special use permits for off-road vehicles, mineral extraction, energy facility development).

(iv) Obligation of future generations to large monetary debts or to social or technological solutions to problems now considered insurmountable.

(v) Major alterations in natural environmental quality, either exceeding local, regional, Sate, or Federal environmental standards, or exposing existing or future generations to increased safety or health hazards.

(vi) Conflicts with proposed or adopted local, regional, State, interstate, or Federal land use plans or policies.

(vii) Adverse effects on designated or proposed natural or recreation areas (e.g., wilderness areas, parks, research natural areas, wild and scenic rivers, estuarine

sanctuaries, national recreation areas, critical habitat, or wetlands).

(viii) Degradation of important aesthetic resources.

(ix) Removal from production of prime or unique farmland as designated by local, regional, State, or Federal authorities.

(x) Major geologic, hydrologic, or meteorologic changes.

(xi) Construction or other activities within an area of significant geologic or hydrologic hazard (e.g., within a major earthquake zone, an area that is landslide prone, or a 100-year floodplain).

(xii) Major effects on a domestic water supply, or a major consumptive or long-term commitment to water use.

(xiii) Major consumptive or long-term commitments to use of energy or nonrenew-

able resources, especially those of non-local origin or in short supply.

(xiv) Major effects on energy sources, existing or potential (e.g., oil, gas, coal, uranium, geothermal, or hydropower resources).

(xv) Condemnation of property rights or fee title to land, and/or large-scale relocation of people, homes, commercial, industrial, or major public facilities.

* * * *

3.10 Contents of NEPA Documentation

A. Environmental Assessments (40 CFR 1508.9 and 1501.3, and 516 DM 3.4). The primary purpose of an EA, as stated in 40 DVR 1508.9, is to aid in NEPA compliance. It determines the threshold at which an EIS must be prepared. It can also be a reiteration of the planning process in written form, and serve to encourage the organiza-

tion of the environmental information available in a manner that will facilitate decisionmaking. The EA should be completed early in the decisionmaking process, so that if it becomes apparent that the project will have significant impacts, then an EIS can be prepared early as well. If the EA reveals no significant impacts, then a FONSI is prepared and the project may be implemented.

(1) EA Contents (40 CFR 1508.9 and 516 DM 3.4). The EA will generally be 15 pages or less, using the outline shown in Exhibit 13. The EA must contain the following:

(a) Cover Sheet

(b) Purpose and Need for Action. This section documents in a few sentences the first step in the planning process. The need must be defined clearly here, in order to ensure that the proposed action and al-

ternatives address it directly. If a programmatic EIS or other program documents have been prepared previously they should be referenced but not repeated.

(c) The Proposed Action and the Alternatives. This section corresponds to the second step in the planning process. It is essential to develop a thorough definition of the proposed action. The development of alternative means to achieve the objectives identified above is critical to any planning use of the EA. It provides a basis for the choice among options available to the decisionmaker in the absence of an EIS.

(i) This step is one of the more creative, and an open mind is needed, along with advice and information from many sources. Using creative problem-solving techniques may prove to be the most helpful

method of approaching and solving the problem.

(ii) All reasonable alternatives should be initially considered (40 CFR 1502.14). However, only practicable alternatives, including no action and the proposed action, need to be discussed in detail in the EA. The alternatives should not be merely exercises done to fulfill this requirement; they should be honest attempts to find other ways to meet the objectives while reducing or eliminating any harmful impacts. The alternatives should be described in detail sufficient to permit comparison of their merits, especially if their impacts are different, e.g., in kind, location, intensity, or duration.

(iii) The fact that FWS may not have authority to implement a particular alternative is not a reason for discarding it from

consideration. Authorities can change in time, special authorization can be provided by Congress, cost or political feasibility of action taken by another agency may enhance the desirability of such an alternative, or action by another organization may prove to serve resource needs better.

(iv) The no action alternative must be discussed. This discussion may contain further information about the circumstances giving rise to the initial assessment of a need for action. However, it should contain an assessment of alternative uses of resources, as related to the proposed action.

(v) As an example of good alternative development, consider the need for protection of an area determined to have outstanding wildlife habitat values. A variety of strategies might be appropriate.

Alternatives ranging from conservation education programs, memoranda of agreement, and local property tax incentives, to the more traditional approaches of land use regulation or acquisition options such as leases, easements, or fee simple purchase could all be considered viable, depending upon local circumstances. A multi-faceted program combining several of the above-mentioned components might prove to be the most practical approach. It might require the involvement of several agencies and organizations in both planning and implementation. As land valuable to wildlife grows increasingly scarce and competition for its use becomes even more keen, such packages of alternative components may be more acceptable to government and other special interests.

(vi) A brief record should be made of those alternatives initially considered but rejected from further evaluation. The rationale for rejection of such alternatives should also be provided.

(d) Description of the Affected Environment. The "Affected Environment" section should succinctly describe the area in which the action occurs (40 CFR 1502.15). Page-sized maps of the general area and the project site help reduce superfluous verbage. Carefully selected photographs may be used as appropriate. Particular mention should be made of the presence or absence of any endangered or threatened species, cultural resources, historic, archaeological, or architectural sites, or wetlands and floodplains.

(e) Environmental Consequences. Good analysis in this section is the key to a

good EA to be used in planning. Since the purpose of preparing an EA is to help determine whether or not the project will significantly affect the human environment, all significant effects, beneficial and adverse, must be noted. Implementation of a project or alternative may generate a variety of potential effects that could include physical, biological, cultural, economic, and social elements. The key effects must be identified.

(i) In addressing the consequences of the alternatives, several points should be kept in mind. Effects should be evaluated in a professional manner for their environmental impacts. Interdisciplinary analysis should be incorporated into effects assessment. This may be provided in-house or through other agency cooperation, expertise contracted for, or structured public forums

and workshops. Analysis of effects should be thorough enough to discover any indirect or cumulative effects from each alternative.

(ii) The effects of alternatives on environmental features of special Federal legal status should be highlighted. Such features would include: threatened or endangered plant or animal special or critical habitats, wetlands, 100-year floodplains, cultural resources (e.g., historic, architectural and archaeological sites and artifacts, specially designated areas (e.g., research natural areas or wilderness areas). The relationship between short-term uses of man's environment and maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources (two categories of effects required to be considered by NEPA)

which would result from implementation of any of the alternatives, should also be identified here.

(iii) When adverse effects are noted, potential mitigative measures to reduce or eliminate such effects are to be identified. Such mitigative measures are then to be worked back into the alternatives as they are refined and finalized, in compliance with the FWS Mitigation Policy (Exhibit 2 of 30 AM 4).

(f) Consultation and Coordination with Others. This section will summarize the public participation undertaken according to 30 AM 3.9E of this chapter.

B. Finding of No Significant Impact (40 CFR 1508.13). After it has been determined by a thorough review of the EA that a proposed action will not significantly affect the human environment, a FONSI will be pre-

pared. A summary of the EA will be incorporated into the FONSI.

C. Notice of Intent (40 CFR 1508.22). The contents of the NOI are described in 40 CFR 1508.22.

D. Environment Impact Statements (40 CFR 1502.1-1502.25). The purpose of the EIS is stated clearly in 40 CFR 1502.1. The EIS aids decisionmaking by providing environmental information to decisionmakers and the public. Much of the guidance given in the previous section on EA's is applicable to EIS preparation also.

* * * *

3.10D(2)

(c) Programmatic and Generic EIS's. If possible, a programmatic or generic EIS should contain a discussion of the requirements to satisfy NEPA at the level of the individual program actions, i.e., for what

specific actions an EIS will be required. The extent to which the action was covered in a previously prepared EIS must be determined. If the comprehensive EIS adequately addressed all of the effects of the proposed action and alternatives, a further EIS may not be required. Possible uses of comprehensive EIS's are explained below:

(i) Programmatic. EIS's are generally prepared for broad Federal actions such as the adoption of new programs or regulations. They define the various programs and analyze the various policy alternatives being contemplated (not funding levels), how well each would meet the identified needs, and the general environmental effects of each. It is critical that programmatic statements be started early in program planning so that they are relevant to policy and are timed to coincide with

meaningful points in the decisionmaking process. Such programmatic EIS's make the preparation of generic and site-specific environmental documents easier by laying the groundwork of policy direction. NEPA compliance for related site-specific actions can be made easier and more useful by grouping their planning and documentation as discussed in the 40 CFR 1502.4(b) of the NEPA Regulations. For example, loosely connected actions in a given geographic area can be treated together.

(2)

91-1927

No. _____

Supreme Court, U.S.
FILED
JUN 2 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

TEXAS WATER CONSERVATION ASSOCIATION,
Petitioner
and
SABINE RIVER AUTHORITY

v.

U.S. DEPARTMENT OF INTERIOR, ET AL.
and
THE SIERRA CLUB AND THE NATIONAL AUDUBON SOCIETY, Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

MICHAEL J. BOOTH *
DAVIDSON, TROILO & BOOTH, P.C.
1900 First City Centre
816 Congress Avenue
Austin, Texas 78701
(512) 478-9506
Counsel for Petitioner
Texas Water Conservation Association

APPENDIX D

AFFIDAVITS, SELECTED INTERROGATORY EXCERPTS AND LETTERS

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APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

SABINE RIVER AUTHORITY	**§**
Plaintiff,	**§**
	§
v.	**§**
	§
UNITED STATES DEPARTMENT OF INTERIOR, ET AL.	**§**
Defendants.	**§**

AFFIDAVIT OF ROBERT S. GOOCH, P.E.

I declare the following to be true to the best of my knowledge:

1. My name is Robert S. Gooch. The information describing my employment, my experience and training in water supply planning and design remains as described in paragraph 1 of my affidavit dated June 9, 1988, and filed on June 16, 1988, as Exhibit B with the Memorandum of Points and Authorities of Plaintiff Sabine River Authority in Support of Motion for Partial Summary Judgment ("First Affidavit"). That

discussion may be supplemented further by noting that my work in water planning has involved working closely with Texas state agencies. I have also worked on the analysis and planning of mitigation for the environmental impacts of reservoir development, as required for Federal and state permits. This affidavit affirms, supplements and incorporates the contents of the First Affidavit and its attached Upper Sabine Basin Regional Water Supply Plan ("Regional Plan"), and will repeat matters contained therein only as necessary to address points raised in the briefs of the Fish and Wildlife Service ("FWS") and/or the Sierra Club.

ENVIRONMENTAL REVIEW OF TEXAS WATER PROJECTS, INCLUDING WATERS BLUFF

2. The Waters Bluff project, like all water supply reservoirs in Texas, must be

permitted by a state agency, the Texas Water Commission ("TWC"), and by a federal agency, the Corps of Engineers ("Corps"). In their permitting efforts, the Water Commission and the Corps of Engineers coordinate with and consider input from the Fish and Wildlife Service.

3. This permitting process typically requires substantial analysis of environmental impacts. Appropriate mitigation is then included as a condition for the issuance of the permits. In developing any major water supply reservoir, an applicant must submit its plans to an environmental review, with an environmental impact statement ("EIS") as the key instrument of evaluation. Through this process, Waters Bluff Reservoir would be subject to all environmental constraints

on reservoir development currently in the laws of Texas and the United States.

4. There are well established procedures for judging the environmental acceptability of proposed reservoirs on a case-by-case basis. There are also well established procedures for mitigating the environmental impacts of specific reservoir projects. The Fish and Wildlife Service has been closely involved in the development of these procedures.

MITIGATION FOR TEXAS WATER PROJECTS

5. The Fish and Wildlife Service has been an active participant in the development of mitigation plans for reservoirs in Texas. As of December of 1986, mitigation had been required for at least three major reservoirs in Texas: Limestone, Richland-Chambers, and Cooper. In each case, the FWS was a participant in

mitigation planning and was or should have been aware of the mitigation requirements.

6. Lake Limestone on the Navasota River was developed by the Brazos River Authority in the late 1970s. Funds set aside for mitigation were later used by the Texas Parks and Wildlife Department ("TPWD") to purchase lands in the Trinity River Basin.(21)

7. Richland-Chambers Reservoir near Corsicana is owned and operated by the Tarrant County Water Control and Improvement District Number 1. After environmental investigations and development of an EIS, the Corps of

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(21) Numbers in parentheses match references listed in Attachment 1 to the First Affidavit and Attachment 1 to this affidavit. Numbers 1 through 20 are from the First Affidavit, and numbers greater than 20 are listed in this affidavit.

Engineers issued a Section 404 permit for the project. The Section 404 Permit required mitigation, including the purchase of 13,400 acres to be managed by TPWD (22,23).

8. Cooper Reservoir is a Corps of Engineers project on the South Sulphur River in East Texas. A comprehensive environmental review of this project, including an EIS, led to development with appropriate mitigation of environmental impacts (24).

9. As of December of 1986, the Fish and Wildlife Service was participating in environmental studies for a number of other reservoir projects, including but not limited to Stacy, Little Cypress, Applewhite, Justiceburg, Big Sandy, Lake Creek and Bedias.

10. Stacy Reservoir, located east of San Angelo, Texas, is sponsored by the Colorado River Municipal Water District. The Corps of Engineers Section 404 permit issued for this project in April of 1987 required the purchase of a 5,990 acre tract or equivalent lands to be managed for the enhancement of wildlife (25). The Corps prepared an EIS prior to issuing the permit.

11. The Little Cypress Reservoir is a proposed project on Little Cypress Creek near Hallsville, Texas, sponsored by the Little Cypress Utility District ("LCUD"). After considering the recommendations of two private consultants, the TPWD, LCUD, TWC staff, FWS and a Hearing Examiner, the Texas Water Commission issued a permit in 1988 requiring a total of 12,000 acres of

mitigation, with 10,000 acres to be bottomland hardwoods (26).

12. The Corps of Engineers has published a Final EIS for Applewhite Reservoir, a proposed project on the Medina River (27). The mitigation proposed in the Final EIS includes acquiring 1,748 acres of land, mostly bottomland hardwoods, and managing the land to benefit wildlife.

13. Planning for mitigation of the Justiceburg Reservoir site is proceeding as part of the Federal 404 permitting process. Big Sandy, Lake Creek and Bedias have not moved to the permitting stage, but the planning and analysis done to date make it clear that none of these sites would be developed without mitigation of environmental impacts.

TEXAS WATER SUPPLY PLANNING AND

THE TEXAS WATER PLAN

14. The first official Texas Water Plan, dated 1968, recommended development of 67 new reservoirs in Texas by the year 2020 (15). This recommendation would require construction of approximately 13 projects per decade. Actual development to meet Texas water needs between the 1968 Plan and the 1984 Plan involved 43 new reservoirs in 16 years, or approximately 27 projects per decade. This is more than twice the rate forecast.

15. A comparison of the 1968 Texas Water Plan with the plan approved in 1984 illustrates the need for flexibility in water planning. Between 1968 and 1984, a number of reservoirs were developed at different locations and different sizes than envisioned in the 1968 plan. Plans

for new reservoirs have been adopted, and plans for some reservoirs have been abandoned due to changing conditions.

16. In its effort to promote planning and orderly development of water resources in Texas, the Texas Water Development Board ("TWDB") recognizes the need for detailed local planning to supplement statewide efforts. Since the adoption of the 1984 Water Plan, the TWDB has encouraged local planning like that carried out in the upper Sabine Basin by the Sabine River Authority. The TWDB recognizes that such planning is necessary for intelligent development of the state's water resources and is not in conflict with its own efforts. In a number of cases, the TWDB has provided financial assistance for local planning.

17. The 1984 Texas Water Plan attempts to project how water demand and supply

might be balanced in the year 2030. These projections show a small surplus for the upper Sabine Basin, based on the assumption that additional sources of water supply will be developed as necessary to supply the area's growing needs.

18. The 1984 Water Plan does not discuss the use of water from Toledo Bend Reservoir to supply the entire upper Sabine Basin. The Plan notes that use of Toledo Bend water in the Marshall area "is proposed" and states that additional studies will be needed "to examine the engineering alternatives and the economic, environmental and institutional considerations that would be involved. . . ." (Page III-5-11). Studies of engineering alternatives and economic considerations have been performed by the Bureau of Reclamation ("BOR") (5) and by

URS Engineers (for the Sabin River Authority) (4). These studies concluded that delivery of water from Toledo Bend Reservoir to the upper Sabine Basin is more costly than other alternatives and is "nonviable" (5). No study has been performed by FWS or any other group on the environmental feasibility of deliveries from Toledo Bend.

THE UPDATE OF THE MASTER PLAN

19. The Update of the Master Plan for the Sabine River and Tributaries in Texas ("Master Plan") adopts projections from the Texas Water Plan which show the need for additional water to meet the growing demands in the upper Sabine Basin. The Master Plan shows a need for 463,950 acre-feet per year of water in the upper Sabine Basin as of 2030 ((10), Page 2-32). The 1984 Texas Water Plan shows a need for

463,900 acre-feet per year of water in the upper Sabine Basin as of 2030 ((12), Page III-5-8). (The difference of 50 acre-feet per year is due to rounding.) The projected need for 463,950 acre-feet per year in the upper Sabine Basin does not include commitments for export from the basin in either case. The Federal Defendants' Memorandum dated December 14, 1988, (28) seems to reflect the mistaken impression that the projections of water use in the upper Sabine Basin in the Master Plan are not consistent with those in the 1984 Water Plan. In fact they are the same.

20. The Master Plan identified Waters Bluff and Big Sandy as the recommended projects to supply the upper Sabine Basin through 2030. The Master Plan lists other sites for the purpose of indicating that

they have been identified as possible reservoir sites, but the Plan does not show those potential sites to be feasible.

UPPER SABINE WATER SUPPLY PLAN AND FIRST AFFIDAVIT

21. As stated on the first page of the Regional Plan, my company was hired to prepare that plan in July of 1987. The Regional Plan was published in May of 1988, and regional water supply planning based on it is proceeding.

22. I prepared the First Affidavit in June 1988, based on the analysis described in the Regional Plan and on information in 19 references, 15 of which were available to FWS when it prepared its environmental assessment ("EA") (2). The four more recent sources cited in the First Affidavit were the Regional Plan itself, the Feasibility Study for the Belzora Landing

Reservoir (first stage to Waters Bluff), and the transcript and applicant's hearing brief for the Little Cypress Reservoir hearings before the Texas Water Commission. The Regional Plan is based on information available at the time that the EA was prepared, and it shows a need for additional water supply in the upper Sabine Basin.. The Feasibility Study on Belzora Landing does not alter the conclusions of the Waters Bluff Feasibility study, which was available to FWS. It merely provides a more detailed analysis of the feasibility of the development of Belzora Landing as a first stage to Waters Bluff, an idea presented in the Waters Bluff study (6). The transcript and the hearing brief for the Little Cypress Reservoir permit hearings provide information on the impact that Fish and Wildlife Service release

proposals would have on the yield of the proposed Little Cypress Reservoir. Thus, First Affidavit and underlying reports present and clarify information which was available at the time of the EA and of which those involved in Texas water planning would have been aware. Neither the First Affidavit, the Regional Plan, the Master Plan, the Waters Bluff Feasibility Study, nor the Belzora Landing Feasibility Study contradicts the Texas Water Plan. These newer publications are more specifically focused in geographic and water project coverage and are supplementary to and more complete than the Water Plan for the area they cover.

23. The Regional Plan, as discussed in the First Affidavit, shows a need for additional water supply. Its demand analysis includes exports from the Sabine

Basin only to the extent of commitments already under contract. The existing contracts are not contingent on additional water development.

24. The water shortage that would result in the Sabine River Basin if no additional sources of supply are developed before 2030 is shown in Table 1, on Page 3 of the First Affidavit. The table shows a shortage of 208,962 acre-feet per year by 2030 with no new supplies.

25. The Federal Defendants' Brief date December 14, 1988 (28) incorrectly interprets the First Affidavit as supporting the reasonableness of the FWS conclusion that Toledo Bend water is available to meet export needs. The use of Toledo Bend water to meet export needs is not discussed in the First Affidavit. Contracts with Dallas, Commerce and Terrell

specifically allocate water from Lake Tawakoni and Lake Fork Reservoir to those cities. Toledo Bend Reservoir is approximately 150 miles farther away from Dallas, Commerce and Terrell than is Lake Tawakoni. Water from Toledo Bend could not be substituted for those cities' contracted supplies in the nearer lakes.

26. Although the First Affidavit does not discuss the use of water from Toledo Bend Reservoir to satisfy the contracts with Dallas, Commerce and Terrell, it does point out that use of Toledo Bend water in the upper Sabine Basin, which is closer to Toledo Bend, is unreasonable due to excessive cost. The First Affidavit states that a pipeline from Toledo Bend Reservoir to the upper Sabine Basin has been studied twice by qualified engineers and found to be "nonviable" and more costly than any

other alternative studied (4,5). The cost of delivery from Toledo Bend to Dallas, Commerce and Terrell would be even more excessive than the cost of delivery from Toledo Bend to the upper Sabine Basin because of the added distance.

27. The Federal Defendants' Memorandum dated December 14, 1988, (28) incorrectly asserts that the First Affidavit states that Big Sandy Reservoir is not needed. The First Affidavit correctly states that water from Big Sandy would be more expensive than water from Waters Bluff.

Respectfully submitted,

/S/ R. S. Gooch
Robert S. Gooch

Dated: 2/15/89

STATE OF TEXAS §
§
COUNTY OF TARRANT §

SUBSCRIBED AND SWORN TO BEFORE ME this the 15th day of February, 1989.

/s/ Barbara Grimes
Notary Public in and for the
State of Texas
My Commission Expires: 9/30/92

ATTACHMENT 1

LIST OF REFERENCES

(21) Personal communication with Pete Pullen of the Brazos River Authority, February 1989.

(22) U. S. Army Corps of Engineers, Fort Worth District: *Richland Creek Reservoir Final Environmental Impact Statement*, Fort Worth, 1982.

(23) U. S. Army Corps of Engineers, Fort Worth District: Section 404 Permit for Richland Creek Reservoir and Record of Decision, Fort Worth, June 1982.

(24) U. S. Army Corps of Engineers, Fort Worth District: *Cooper Lake and Channels, Texas, Final Supplemental Environmental Impact Statement,* Fort Worth, March 1981.

(25) U. S. Army Corps of Engineers, Fort Worth District: Section 404 Permit for Stacy Reservoir and Record of Decision, Fort Worth, April 1987.

(26) Texas Water Commission: Permit 5098 (for Little Cypress Reservoir), Austin, September 1988.

(27) U. S. Army Corps of Engineers, Fort Worth District: *Applewhite Reservoir Final Environmental Impact Statement,* Fort Worth, January 1989.

(28) U. S. Department of the Interior, *et al.*: "Federal Defendants' Memorandum in Opposition to Motions of Plaintiff and Plaintiff-Intervenor for Partial Summary Judgement and in Support of Cross-Motion

for Summary Judgement," Tyler and Washington, December 14, 1988.

APPENDIX D

AFFIDAVIT

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFORE ME, the undersigned Notary Public, on this day personally appeared Leroy Goodson, who being by me duly sworn on his oath deposed and said that the following statements are true:

"My name is Leroy Goodson and I am over 21 years of age, competent to make this affidavit, and personally acquainted with the facts herein stated.

"I am general manager of the Texas Water Conservation Association. The Texas Water Conservation Association is a statewide organization composed of river authorities, individuals, firms, corporations, cities, water districts, public and private agencies, and groups dedicated to the task of conserving, developing, protecting and

utilizing the water resources of Texas for all beneficial purposes. Other goals of the Association are to preserve, promote and defend state primacy and administration of all laws and regulations involving water rights, quality, and utilization; protect and preserve surface water quality through support of regional watershed management programs; develop, control and manager the water resources of the State at the lowest practicable level of governmental unit, whether local or regional, subject to the State's right of continuing supervision; and maintain the management independence of local and regional water resource management agencies in order to retain direct lines of responsibility and responsiveness between such agencies and the constituencies they serve; implement effective water conservation programs which

meet the many varied circumstances of the diverse State of Texas, such programs to be implemented and managed by local entities where practical and feasible; and protect existing water rights without impeding the orderly development and beneficial utilization of the State's water resources.

"Within the membership of the Texas Water Conservation Association, the following political subdivisions are most directly affected by the Bottomland Hardwood Preservation Program: Brazos River Authority, Little Cypress Utility District, Sabine River Authority, Trinity River Authority, North Texas Municipal Water District, City of Dallas, City of Houston, Tarrant County Water Control and Improvement District Number One, Angelina-Neches River Authority, Red River

Authority, and Upper Neches River Municipal Water Authority.

/S/ Leroy Goodson
AFFIANT

SUBSCRIBED AND SWORN TO BEFORE ME this the 15th day of February, 1989.

/S/ Linda C. Blansitt
Notary Public in and
for the State of Texas

LINDA C. BLANSITT
Typed or Printed Name of
Notary Public

My Commission Expires:
March 3, 1992

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION

SABINE RIVER AUTHORITY
Plaintiff,

Civil Action
TX-87-36-CA

UNITED STATES DEPARTMENT OF INTERIOR, et al.
Defendants.

AFFIDAVIT OF ALBERT GRAY

DEVELOPMENT MANAGER OF SABINE RIVER AUTHORITY

I declare the following to be true to the best of my knowledge:

I. INTRODUCTION

1. I am Albert Gray, Development Manager for the Sabine River Authority.

2. This affidavit incorporates by reference and restates my affidavit dated June 13, 1988 and filed on June 16, 1988 as Exhibit D to the Memorandum of Points and Authorities of Plaintiff Sabine River

Authority in Support of Motion for Partial Summary Judgment ("First Affidavit").

II. FWS Failure to Consult and Concealment of FWS Plans

3. The Authority had no knowledge of FWS preservation plans for the "Middle Sabine Site", an area in conflict with the Waters Bluff site,-until it received a copy of the Draft EA on September 10, 1986 announcing FWS's plan to acquire the Club site easement. At meetings between the Bureau of Reclamation (BOR), the Authority, and FWS, discussions took place concerning "the Big Sandy site", the "confluence site" and a third site added at the suggestion of the Authority (the "upper Sabine site") as possible mitigation sites for the Big Sandy Reservoir. The "Middle Sabine Site" was never discussed and it was not included in the FWS's Planning Aid Report for the Texas

Big Sandy Project dated September 24, 1985. See map attached hereto identifying the geographical distinction between mitigation sites discussed by FWS and the Middle Sabine site (i.e. the location of the Club property). The Planning Aid Report does establish that FWS utilized the Habitat Evaluation Procedure (HEP) in evaluating mitigation sites for the proposed Big Sandy Reservoir and concluded that the upper Sabine site suggested by the Authority was FWS's preferred alternative.

4. In our meetings, FWS did mention the "Concept Plan" and it is referenced in the Planning Aid Report, but they did not provide that plan to the Authority even though it was requested on three occasions. FWS first provided a copy of the Concept Plan to the Authority when we met with FWS

in Albuquerque on September 30, 1986, after the Draft EA had been released.

5. In October 1985, the Authority requested information from FWS concerning what endangered or threatened species might be affected by Waters Bluff. FWS did not respond with any mention of plans to establish a refuge in the Waters Bluff site.

6. The Concept Plan states that FWS met with governmental agencies regarding the Concept Plan. The Authority was not one of those agencies, even though the Authority is a key water resource agency in the Sabine Basin and implementation of the Concept Plan would have serious impacts on its ability to provide for needed water supplies.

7. FWS's EA discusses written reports obtained from the Authority but FWS never

discussed those reports or other water supply information with the Authority. If FWS had discussed the matter with us, we would have advised them of facts overlooked in the EA, for example, the reports of the infeasibility of transfer of Toledo Bend water for use in the upper Sabine Basin. (URS, prepared for the Authority, dated May, 1983; and BOR dated September, 1986).

8. The Master Plan prepared in March, 1985, at the Authority's direction did not mention that Waters Bluff would conflict with a FWS Priority One site because we were not aware of that fact until receipt of the Draft EA on September 10, 1986.

III. Water Contracting and Permitting Procedures

9. The Texas water rights procedure generally require water to be sold pursuant to contract from a particular project.

Thus, water contracts are usually executed after most planning studies have been completed, normally two years before construction begins. The typical planning horizon, from completion of preliminary feasibility studies and financing arrangements to project completion is ten years. As a consequence, there are no existing contracts (for in-basin or export use) for the sale of water from Waters Bluff. Any future export contracts related to Waters Bluff would be expected to be for municipal uses.

10. All contracts, whether for export or not, are binding. Under these contracts, the sale of water from a project cannot be diverted to other users by the Authority, in-basin or otherwise. A breach of these contracts would entitle a user to seek their enforcement.

11. When water rights permits or permit amendments are needed, these contracts also are subjected to a full-public hearing and comment period in the permitting process. The Texas Water Commission, in evaluating a contract for inter-basin transfers, considers whether there will be sufficient remaining supplies to meet projected in-basin water needs.

IV. The Authority's Responsibility to the Basin and the State

12. The Authority's responsibility is primarily related to providing for water supplies within the Sabine Basin. However, the Authority also has a duty to those outside the Sabine Basin. Even though river authorities in Texas have water supply management functions in their respective jurisdictional areas, the surface waters in streams are under State

ownership and the State allocates these waters, through the permitting process, for the use and benefit of all the people of Texas.

V. Authority Plays Active Role in Water Quality Management and Environmental Enhancement

13. The Authority has taken an active role in water quality management and environmental enhancement activities since its initial operational activities began in 1954, and over the years has expanded this service to meet increasing needs throughout the Sabine River Basin. This commitment is demonstrated by the Authority's expenditure of over $1.3 million from September 1, 1983 to August 31, 1986, for water quality monitoring and environmental protection. Also, Toledo Bend Reservoir has a non-federal wildlife management area made

possible through a cooperative arrangement between the Authority, the Texas Parks and Wildlife Department and Ducks Unlimited.

VI. The Authority's Role as a State Agency

14. The Authority was created by the State Legislature in 1949 as an official agency of the State of Texas. The Authority operates within its Statute of Creation and is governed by a nine-member Board of Directors appointed by the Governor of Texas. This Board of Directors establishes equitable rates for the sale of water and other services of the Authority. The Authority does not earn a profit. Rather, its revenues are utilized to provide for operation and maintenance of its facilities and to provide for other necessary services, including water quality and environmental protection.

VII. Waters Bluff

15. Waters Bluff is not a speculative project. The reservoir proposal evolved out of standard Authority planning procedures before the Authority became aware of FWS's interest in an area within the reservoir site. By the time the Authority became aware of FWS's interests -- when it received the Draft EA in September 1986 -- the Authority had already performed initial feasibility studies as part of the Update of the Master Plan (March, 1985) and a Waters Bluff Preliminary Feasibility Study (March, 1986) and the Authority's Board of Directors have approved both reports.

16. It is not correct that the Waters Bluff supply is not needed because Big Sandy, Prairie Creek, Carthage and Toledo Bend Reservoirs will be adequate to meet

the water needs of the Sabine River Basin through the year 2030. First, all of these reservoirs given as alternative water sources to Waters Bluff, except Toledo Bend, are as preliminary or more so than Waters Bluff - none are permitted or designed. Any water supply reservoir must go through a planning process, during which studies are made and refined. The Big Sandy Reservoir had conflicted with a Priority One area (the floating glade marsh) and the two water agencies studying that project, the BOR in cooperation with the Sabine River Authority, moved the damsite downstream five miles and downsized the project to avoid the floating glade. As a result, the proposed Big Sandy Reservoir would have a reduced water yield and it is still located in a Priority Two site. The proposed Carthage Reservoir,

like Waters Bluff, would be located in a Priority One site; and the Carthage Reservoir site is underlain with lignite and oil and gas reserves. The Prairie Creek Reservoir would supply less than ten percent of the additional water needed in the upper Sabine Basin by 2030, and is intended only as a local water supply project. Big Sandy and Prairie Creek Reservoirs combined would supply only one-third of the need by 2030. The BOR is now completing studies of the Big Sandy Project and is waiting on the fate of Waters Bluff or Belzora Landing because Big Sandy would cost approximately the same as Belzora Landing but would only yield half as much water. Toledo Bend water for upper Basin use, as previously mentioned, is not viable. Except for possible supply to the City of Marshall, the 1984 Texas Water Plan

does not recommend that Toledo Bend supply water upstream; however the 1984 Water Plan did recommend the possible use of up to 961,700 acre feet per year of Toledo Bend water for transfer out of basin downstream for use in the Houston-Galveston area. FWS was aware of and supports this use of Toledo Bend water according to its January, 1986 Planning Aid Report for the San Jacinto Project. (see copy attached at page 35). Also, use of Toledo Bend water to supply needs upstream has been found infeasible in two different studies (as mentioned in 7 above) with BOR terming the proposal "nonviable".

17. Approximately two-thirds of the Toledo Bend water is no longer available for use in the upper Basin because it is commited through an Option Agreement between the Authority and the San Jacinto

River Authority (SJRA) for their use in the greater Houston area. Negotiations for this Option Agreement began before March, 1986 and were concluded successfully on February 4, 1987. Initial feasibility studies for this water transfer project were completed in December, 1988. This use of Toledo Bend water has been supported by FWS as well as various environmental groups including the Houston Sierra Club and the Houston Audubon Society. As recently as January 1986, FWS recommended that Toledo Bend water be used in the Houston area in their report to BOR stating that the proposed Lake Creek Reservoir in the San Jacinto Basin was unnecessary.

18. The remaining one-third of Toledo Bend water is needed to supply water for use in the lower Sabin Basin. Almost all municipal water needs and some industrial

water needs in the lower Sabine Basin are currently being supplied from groundwater. Our experience has been that these groundwater users are in the process of changing over to surface water use due to salt water intrusion, from heavy groundwater use, and potential surface subsidence.

19. The proposed Carl Estes Reservoir, which is underlain with lignite, is not expected to be built before 2030 because there is no active mining in the reservoir at this time and lignite mines are planned for an active life of at least 25 years. Carl Estes is scheduled to be included in the 1989 Corps of Engineers list of projects to be deauthorized since it has been in an inactive state with no federal expenditure of funds since 1979. This inactive status was well known at the time

FWS prepared its Draft and Final EA. While Carl Estes could theoretically be built after 2030, there is no certainty when or if it would be built because of the same problems already mentioned. Also, if Waters Bluff were built first, it is likely that Carl Estes would never be built due to the attendant large reduction in yield of this project.

20. Without Waters Bluff as a source of water supply, existing surface supplies would be stressed beyond capacity, and there would be additional demand for groundwater. Based on my experience in working with entities in the upper Sabine Basin concerning their water supplies, groundwater supplies in that area are meeting the needs of some individual and small water users but cannot supply any appreciable increase in water needs due to

poor water quality and small quantity production from most wells.

21. All water permitted to the Authority for use in the upper Sabine Basin is committed through long-term water supply contracts. Present needs for additional water are projected to grow to 208,962 acre-feet per year by the year 2030. Water supply contracts would be executed for the Waters Bluff Reservoir within approximately two years of construction of that project.

/s/ Albert J. Gray
Albert J. Gray

STATE OF TEXAS

COUNTY OF ORANGE

Subscribed to and sworn before me by Albert J. Gray on this 15th day of February, 1989.

/s/ Billie Kay Rogers
Notary Public, State of Texas
My Commission Expires: 5-26-89

AFFIDAVIT OF ALBERT J. GRAY

DISCUSSION

SELECTION OF THE LEAST DAMAGING ALTERNATIVE

The mitigation policy of FWS (Federal Register Vol. 46, No. 15, pages 7644-7663) has as a planning goal that, for resource category 2 habitat, there should be no net loss of in-kind habitat value. For resource category 3 habitat there should be no net loss of total habitat value while minimizing losses to in-kind habitat values. For water supply projects, this is accomplished first by selection of the least damaging alternative and then by compensation for unavoidable losses.

The FWS provided BR with the first planning-aid report on March 30, 1984. That report recognized that there would be significant losses to Resources Category 2 wildlife habitat with any reservoir. The

report recommended that, in consideration of these losses, planning consider foremost the use of alternate sources of water to meet projected needs.

One of the preliminary findings by BR (1984) on this project was that, even by developing reservoirs at both lower Lake Creek and Cleveland (a combined yield of 118,000 acre-ft/yr), the in-basin water supply would not meet a 2030 deficit of 747,000 acre-ft/yr and out-of-basin sources would be needed. However, the scope of the study does not extend out of the basin even though there appears to be sufficient water in the Sabine River basin to meet the entire projected deficit without the need to flood over 22,600 acres of wildlife and grazing habitat (Table 9). As an example, the firm yield of Toledo Bend is about 2,074,000 acre-ft/yr of which half is

available to Texas. Only about 2,250 acre-feet of this is presently committed (Albert Gray, Development Manager, Sabine River Authority, personal communication).

The environmental impact of diverting water from the Sabine Lake estuary does not, at this stage of planning, appear to be significant. The average gaged flow from the Sabine and Neches Rivers combined since 1941 is 11,173,000 acre-ft/yr. If 747,000 acre-ft/yr were exported from Toledo Bend away from the catchment of the estuary along with:

- 167,120 acre-ft/yr from Lake Tawakoni (80% of the firm yield),
- 126,210 acre-ft/yr from Lake Fork (70% of the firm yield),
- 115,452 acre-ft/yr from Lake Palestine (54% of the firm yield), and
- 709,800 acre-ft/yr from Rockland (entire _____proposed firm yield), 1,118,582 + 747,000 = 1,865,582

the balance of flow to the estuary would be approximately 9,300,000 acre-ft/yr. This is approximately 1.6 times as much water as the Texas Department of Water Resources (1981) has forecasted is needed to sustain the estuary with river flows. The most economically feasible diversion alternative is via an aqueduct at a pickup point on the Sabine River above Orange, Texas (BR 1985). This would facilitate instream use of the water by the fishery over much of the lower Sabine River.

The cost of alternative water sources is important. Water from lower Lake Creek would cost roughly $1.00 per 1,000 gal. water from Cleveland Lake would cost about $0.70 per 1,000 gal (BR 1984). Water from Toledo Bend would cost $0.33 per 1,000 gal for transportation and about $0.10 per 1,000 gal for procurement from the Sabine

River Authority for a total cost of $0.43 (BR 1985 and Albert Gray, pers. comm.)

There is clearly ample justification to include within the scope of this study the alternative of using existing sources of water out of the basin that would preclude the need to impact high quality wildlife habitat and the need to fund wildlife mitigation features as a part of reservoir development. We reiterate our comments to you dated July 24, 1984, on the preliminary findings of BR that, "No reservoir alternative will be environmentally acceptable to the FWS until this (an examination of out of basin water sources) is done."

January 1986

PLANNING-AID REPORT
FOR THE SAN JACINTO PROJECT
MONTGOMERY AND SAN JACINTO COUNTIES, TEXAS

by

Frederick T. Werner
Clear Lake Field Office
U.S. Fish and Wildlife Service
17629 El Camino Real, Suite 211
Houston, TX 77539

for
U.S. Bureau of Reclamation
Southwest Region
Amarillo, Texas

D-49

APPENDIX D-AFFIDAVITS
Albert Gray
February 15, 1989

EXECUTIVE SUMMARY

The Bureau of Reclamation is presently evaluating potential reservoir development in the San Jacinto River basin to meet a projected Houston area water deficit of as much as 747,000 acre-feet per year by 2030. This, the second planning-aid report on the San Jacinto Project, evaluates the fishery resources of Lake Creek and the West Fork of the San Jacinto River below Lake Creek using Instream Flow Incremental Methodology (IFIM). Wildlife resources were also evaluated for three reservoir alternatives (Figure 1) using Habitat Evaluation Procedures (HEP).

The West Fork has good water quality and provides support for most life stages of fish endemic to the stream. Lake Creek is a supporting tributary for the West Fork, particularly in providing spawning habitat.

A reservoir on Lake Creek would convert stream habitat to broadwater habitat and create a lake fishery that would be equivalent to that in Lake Conroe.

Wildlife habitat within the lands needed by the three reservoir alternatives consists primarily of pine and pine-hardwood forest with lesser amounts of bottomland forest, transitional forest, and areas cleared for pulpwood and pasture. The bottomlands have been classified as Resource Category 2 habitat; the rest as Resource Category 3 habitat. Habitat value in terms of habitat units is the least for the upper Lake Creek site and about the same for the lower Lake Creek and Cleveland sites. The latter should be dropped from further consideration due to the socioeconomic value of the habitat in supporting a national forest and the

endangered red-cockaded woodpecker as well as the wishes of San Jacinto County that the area not be flooded.

There is ample justification to consider out-of-basin water sources to meet the needs of the basin in lieu of habitat loss from a reservoir alternative. Toledo Bend Lake should be the primary target of the study.

If a reservoir alternative is selected, compensation should be directed at conserving bottomlands by protection against impending losses, improvement of existing bottomland habitat and the conversion of other types of habitat to bottomlands. There are several important management measures that can be carried out before impoundment to improve a reservoir for fish and wildlife including multi-level

outlets, selective clearing, public access, fish attracting structures and fencing.

Optimum flows for the West Fork were identified using IFIM. For most months these flows fell below the median flows in the stream. Flows to maintain spawning habitat associated with the stream are also needed in the April-June spawning months. Optimum flows for Lake Creek could not be identified because they consistently exceeded the limits of the analysis.

The Fish and Wildlife Service recommends that:

• out-of-basin water sources be investigated as thoroughly as in-basin sources to meet the short and long term requirements for water in the Houston metropolitan area, and the most economically, socially and environmentally acceptable alternative be selected;

• compensation for unavoidable losses from a reservoir alternative emphasize the conservation of mature or overmature bottomland forests by protection against impending losses, improvement of existing bottomland and the modification of other types of habitat;

• development of a reservoir include multi-level outlets, a clearing plan that considers the needs of fish and wildlife, public access, fish spawning structures and fencing; and

• instream flows recommended in Table 12 for the West Fork be included as criteria for detailed project planning along with a summer-fall flow of 10 cfs and a winter-spring flow of 30 cfs for Lake Creek below the reservoir.

APPENDIX

AFFIDAVIT

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFORE ME, the undersigned Notary Public, on this day personally appeared Charles E. Nemir, who being by me duly sworn on his oath deposed and said that the following statements are true:

"My name is Charles E. Nemir, and I am over 21 years of age, competent to make this affidavit, and personally acquainted with the facts herein stated.

"I am the Executive Director of the State Board of Registration of Professional Engineers. Prior to my employment with the State Board of Registration, I was Senior Engineer for Brown & Root USA for 1-1/2 years. At Brown & Root USA, I served as Manager for Water Resources Projects. Before my employment with Brown & Root USA,

I was Executive Director of the Texas Water Development Board for 1-1/2 years, Executive Director of the Texas Department of Water Resources (the predecessor agency of the Texas Water Commission) for 3-1/2 years, Deputy Director or Assistant Director of the Texas Department of Water Resources for 5-1/2 years, and Assistant Director of the Texas Water Development Board for 5 years.

"My educational background includes a Bachelor degree and Master's of Science degree in Engineering from the University of Texas at Austin. I have been a registered Professional Engineer in Texas since 1961, Number 20611.

"Based on my experience in the field of water resources management and development, I feel I am an expert and qualified to give my expert opinion.

"Part of my testimony is based on excerpts from the Texas Water Plan formally titled "Water for Texas: A Comprehensive Plan for the Future, Texas Department of Water Resources, November 1984," which is included in the Administrative Record in this case. As Executive Director of the Texas Department of Water Resources, I signed the Water Plan and was responsible for all phases of the Plan's development. I also moderated most of the public hearings held on the Plan. In addition, I have reviewed the report "Texas Bottomland Hardwood Preservation Program, Final Concept Plan," U.S. Fish and Wildlife Service, May 1985 (TBHPP).

"The TBHPP identifies 62 bottomland areas for consideration within the "area of ecological concern." The stated purpose of this program is to identify and seek

methods for preserving as much of the remaining bottomland habitat in east Texas as possible. Not all of these sites are recommended for preservation and other areas may be listed as further information becomes available. TBHPP at 4, 27. The program will utilize both easement and fee acquisition and in all instances the least interest acquired will be perpetual nondevelopment rights. TBHPP at 28. The protection priorities for individual sites will be based on several factors including threat to conversion of alternative uses. One of the alternative uses recognized as a threat to bottomland by the U.S. Fish and Wildlife Service was reservoir construction.

"Availability of water for beneficial use is critical to the well being of the state of Texas not only economically but for the

health and welfare of the state's residents. Consistent with legislative direction to develop the Water Plan, the Department of Water Resources identified sources of water supply, including groundwater, surface water, reuse of wastewater, water conservation, desalinization, and weather modification. While all of these sources have their place in Texas' future, the Department determined that development of surface water supplies has the most promise in continuing Texas' prosperity and health into the next century. Development of new reservoir sites are needed to meet the water needs of Texas because for the most part the water in existing reservoirs is either already in use or specifically committed to future use.

"My review of the Texas Water Plan, TBHPP, and the work done by Gordon Thorn, an engineer at the Texas Water Development Board, shows that 27 of the reservoir projects proposed in the Texas Water Plan would be potentially impacted by the TBHPP. Among the political subdivisions most immediately affected by the TBHPP are the Trinity River Authority, Sabine River Authority, North Texas Municipal Water District (NTMWD), Upper Neches Municipal Water Authority, Tarrant County Water Control and Improvement District Number One (TCWCID), Little Cypress Utility District, and the City of Dallas. Other political subdivisions which have reservoir sites threatened by the TBHPP include the Brazos River Authority, the Red River Authority and the City of Houston. Political subdivisions do not develop additional

water supplies in order to make a profit, rather they develop these supplies to meet their citizens or service areas' water needs. Their rates are fixed to recover costs, including debt service.

"The Texas Water Plan states that existing surface water supplies in the Trinity River basin are not sufficient to meet anticipated surface water needs in Zone 1. Texas Water Plan III-8-13. Zone 1 is commonly called the Upper Trinity basin. The major municipal water use in Zone 1 is in the Dallas/Fort Worth Metroplex area and the surrounding counties. The principle surface water suppliers in this area are Dallas, NTMWD, and TCWCID. The Trinity River Authority also supplies water to customers in this area, as well as being the entity responsible for the Trinity River Master Plan. The Sabine River

Authority owns reservoirs which either supply or will supply water to the Upper Trinity basin and is planning reservoirs to supply additional water to this area. The Little Cypress Utility District (LCUD) holds a state water permit to the Little Cypress Reservoir, but has not begun land acquisition. The Upper Neches Municipal Water Authority (UNMWA) holds a state water permit to Eastex reservoir. Both UNMWA's and LCUD's reservoirs are subject to the donation of conservation easements to the U.S. Fish and Wildlife Service by area landowners who will be impacted by these reservoirs. In the latest Brazos River Authority (BRA) Master Plan, BRA has two of its master plan reservoirs that are potentially impacted by the TBHPP: Millican and Caldwell. Millican reservoir would inundate bottomland hardwood sites

identified for preservation and Caldwell reservoir would potentially impact water levels in sites identified for preservation in the TBHPP. The reservoirs discussed in this affidavit are located and identified on the map as Attachment 1.

Dallas, North Texas Municipal Water District and Tarrant County Water Control and Improvement District No. 1

"Existing and under-construction surface-water storage and conveyance facilities available to the City of Dallas are sufficient to supply Dallas' water needs until the year 2020 when additional water will be needed. The proposed Carl Estes and Marvin Nichols, Stage 1, Reservoirs, in the Sabine and Sulphur River Basins, respectively, are alternative sources to meet these water demands through 2030. Texas Water Plan III-8-15. The City of

Dallas also is evaluating Parkhouse I, Parkhouse II, and Nichols II as other potential sources of water. The City of Dallas serves the Cities of Flower Mound, Lewisville, Coppell, Carrollton, Addison, Farmers Branch, Irving, Grand Prairie, Cockrell Hill, Duncanville, Cedar Hill, De Soto, Lancaster, Hutchins, Seagoville, and Balch Springs. Potential entities which may be served are the Cities of Wilmer, Glenn Heights, Park Cities, The Colony, Frisco, Argyle, Ponder, Bartonville, Krum, Prosper, Celina, Aubrey, Sanger, Pilot Point, Krugerville, Gunter, Tioga, Collinsville, Valley View, Gainsville, and Muenster.

"The NTMWD supplies water to Farmersville, Forney, Garland, Mesquite, McKinney, Plano, Princeton, Richardson, Rockwall, Royse City, Wylie, Allen,

Fairview, Frisco, Kaufman, Lucas, Murphy, Parker, Rowlett, Sachse, Sonnyvale, Dallas, Cash Water Supply Corporation (WSC), College Mound WSC, East Fork WSC, Forney Lake WSC, Gastonia-Scurry WSC, Lavon WSC, Milligan WSC, Mount Zion WSC, Nevada WSC, Rose Hill WSC, Seis Lagos WSC, and Wylie Northeast WSC. Projected water needs of the NTMWD service area will exceed existing supplies and those available from the proposed Red River Diversion and Cooper Reservoir between 2000 and 2010. George Parkhouse Reservoir, Stage I, in the Sulphur River Basin is proposed by the Texas Water Plan as a likely additional surface-water source to meet the NTMWD's needs through 2010. Texas Water Plan III-8-16. Additional shortages expected by 2020 can be met by constructing Stage II of George Parkhouse Reservoir before 2020.

Texas Water Plan III-8-16. Further water supplies will be needed by 2030 to meet projected additional growth in demand. A probable source of these supplies is the potential Marvin Nichols Reservoir, Stage I, in the Sulphur River Basin. Another source of surface water for the District is the potential Bonham (Corps of Engineers) project in Zone 3 of the Red River Basin. These sources could supply NTMWD's long-term needs of the District should the other proposed projects be infeasible.

"TCWCID supplies water to the cities of Fort Worth, Arlington and Mansfield, the Trinity River Authority of Texas (in the Tarrant County Water Supply Project), and municipal and industrial water users in Wise, Jack, Parker, Ellis, Johnson, Henderson, Kaufman, Navarro, and Freestone Counties. The District's municipal supply

customers in turn provide potable water to approximately one million people. The Texas Water Plan and the TCWCID's own studies project that the TCWCID service area's water needs will exceed existing supplies sometime around the year 2010. Texas Water Plan III-8-16. The Tehuacana Reservoir project, located on Tehuacana Creek, is expected to supplement TCWCID's water supply. By the year 2020, however, increases in municipal, manufacturing, and steam-electric power plant cooling water demands on system reservoirs will create a deficit. The Texas Water Plan has identified the proposed George Parkhouse, Stage II and Marvin Nichols, Stage I, Reservoirs in the Sulphur River Basin as additional sources to supply water. Texas Water Plan III-8-16. TCWCID has identified these reservoir sites, as well as Tennessee

Colony (Trinity Basin), Weches (Neches Basin), Ponta (Neches Basin), Black Cypress (Cypress Basin), George Parkhouse I (Sulphur Basin), and Marvin Nichols Stage II (Sulphur Basin).

"Some of these projects could be funded by the City of Dallas, TCWCID and NTMWD's systems together or in some combination since each of these systems could draw additional water supplies from these projects. Some of these projects also could be developed by each entity. TCWCID and the City of Dallas are currently investigating the institutional, engineering, and environmental aspects of many of these reservoir projects to determine the best alternative to and at what time each reservoir will be needed. It must be remembered that some of these reservoirs are alternatives to other

projects and some of these reservoirs are incompatible with each other, i.e., selection of one site will preclude development of another site. These reservoir sites are located throughout east Texas and throughout the federal defendants "area of ecological concern."

"These Reservoir sites can be used by the entities in the Upper Trinity basin because of the ability to construct conveyance systems. The City of Dallas and TCWCID already have constructed long pipelines from east Texas reservoirs to their service areas. TCWCID has a 74 mile and a 90 mile pipeline connecting Cedar Creek and Richland/Chambers reservoirs to Fort Worth and Tarrant County. The Richland/Chambers pipeline also can be used to transport water from Tehuacana Reservoir because TCWCID plans to physically connect the two

reservoirs. Dallas has a pipeline from Lake Tawakoni to its service area and is in the process of building a pipeline from Lake Fort to Lake Tawakoni. NTMWD is constructing a pipeline which together with the use of the bed and banks of Sister Grove Creek will transport water from Lake Texoma to Lake Lavon. NTMWD and the City of Irving also are in the process of planning for the construction of a pipeline from Copper Reservoir to Lake Lavon and Lake Lewisville.

Of course, there is a limit on how far water can be diverted without the cost being economically prohibitive. For example, cost studies have shown that it is infeasible to pump water from Toledo Bend to the Marshall, Longview and Shreveport, Louisiana area while it may be feasible to divert water from Toledo Bend Reservoir to

the City of Houston. Serving Houston from Toledo Bend is feasible in part because of the ability to use natural channels and gravity flow instead of pumps to move the water.

Trinity River Authority

"Trinity River Authority has prepared a master plan for the entire Trinity River Basin which identifies a number of potential reservoir projects in Zones 2 and 3 of the basin. In addition to Tennessee Colony and Tehuacana, the projects identified are Upper Keechi, Big Elkhart, Hurricane Bayou, Lower Keechi, Bedias, Nelson, Harman, Gail, Mustang, Caney, and Long King Reservoirs. A study of the potential Bedias Reservoir, in Madison, Grimes, and Walker Counties, is nearing completion by the Trinity River Authority and the U.S. Bureau of Reclamation to

determine its feasibility as a possible water supply for future municipal and industrial purposes;in the Houston and local areas. Texas Water Plan III-8-17.

"The Tennessee Colony Reservoir project is an authorized Corps of Engineers project needed for flood control now. The Texas Water Plan identifies Tennessee Colony as a potential source of water for downstream and adjacent basin water users. Texas Water Plan III-8-17. Trinity River Authority, TCWCID, and the City of Dallas also consider Tennessee Colony as a potential source of water for the Upper Trinity basin. Tennessee Colony's usefulness as an alternative water supply is currently questionable because of lignite deposits in the conservation pool. Texas Water Plan III-8-17.

Red River Basin

"In the Red River Basin, the Texas Water Plan identifies five potential major reservoir projects which are available for future use. Big Pine Lake is an authorized Corps of Engineers reservoir project located on Big Pine Creek in Red River and Lamar Counties which would provide flood protection along Big Pine Creek, water-supply storage for regional municipal and manufacturing purposes, recreation, and fishing and hunting. Bonham Reservoir would lie in Fannin County on Bois d' Arc Creek and is currently under study by NTMWD for use as an additional water supply. The Pecan Bayou Reservoir site is located on Pecan Bayou near Clarksville in Red River County. Liberty Hill dam site is located on Mud Creek near New Boston in Bowie County. Barkman Creek Reservoir is a

potential industrial water-supply project located in Bowie County near Texarkana. Big Pine Lake would inundate a site identified for preservation by the TBHPP. Pecan Bayou, Bonham, Barkman Creek, and Liberty Hill reservoirs could impact water levels of bottomland hardwood sites identified for preservation in the TBHPP.

Sulphur Basin

"In the Sulphur Basin, the Texas Water Plan recognizes that "major surface-water storage and conveyance facilities will be needed in the Sulphur River Basin to supply water to adjacent river basins, particularly the Trinity River Basin". Texas Water Plan III-3-8. The Texas Water Plan identifies NTMWD, City of Dallas, and TCWCID as the entities needing additional future water supplies from this basin. The Sulphur Basin has two potential major

reservoir sites both of which can be built in stages. George Parkhouse Reservoir, located downstream of Cooper Reservoir and Marvin C. Nichols Reservoir located downstream of Parkhouse. Texas Water Plan III-3-8.

"Stage One of Parkhouse Reservoir is proposed to meet NTMWD's water needs through 2010. The development of Stage II of George Parkhouse Reservoir on the North Sulphur River, in addition to waters provided by Cooper and Parkhouse Stage I Reservoirs could be used to meet the year 2020 needs in the Trinity River basin for the TCWCID and NTMWD. Texas Water Plan III-3-8.

"Cooper and Parkhouse Reservoirs could supply the increased water needs for NTMWD through the year 2030. However, TCWCID and the City of Dallas are projected to need

additional surface-water resources to meet water demands. Stage I of the Marvin C. Nichols Reservoir project downstream of Parkhouse Reservoir could provide this water supply. Both Parkhouse Stage I and Nichols Stage I would inundate portions of bottomland hardwoods identified for preservation under the TBHPP. Stage 2 of both reservoirs could additionally impact the water levels of the bottomland hardwood sites identified for preservation in the TBHPP.

Cypress Basin

"In the Cypress Creek basin, the Texas Water Plan recognizes that there are two reservoir sites available in the basin for development of additional water supplies, the Little Cypress Reservoir and the Black Cypress Reservoir. Texas Water Plan III-4-8. The Little Cypress Reservoir has

already been permitted by the Texas Water Commission by the Cities of Kilgore, Longview, Marshall and Harrison County. Black Cypress Reservoir is currently under consideration by the TCWCID as a potential source of additional water in its current long range planning study. Both of these reservoir sites would inundate bottomland hardwood areas that are identified for preservation in the TBHPP.

Sabine Basin

"In the Sabine basin, the Texas Water Plan recognizs that there are several reservoir sites which can be developed for either in-basin or out-of-basin water supply needs. Texas Water Plan III-5-11. These reservoirs are Big Sandy, Carl Estes, Prairie Creek, Carthage, and Bo.. Weir. The Sabine River Authority also has identified the Waters Bluff reservoir site as the most

promising source of additional water supply in the region. The Sabine River Authority and the Texas Water Plan have identified a need for additional water supplies in the Sabine Basin by the year 2030. The Texas Water Plan also states that the City of Dallas may need to look at Carl Estes as a potential source of water by the year 2020. Texas Water Plan III-5-11.

"Unfortunately most of these reservoir sites are potentially impacted by the TBHPP. The Waters Bluff project, of course, is effectively eliminated because of the acceptance of the Club easement into the refuge system. Big Sandy, Carl Estes, and Carthage would inundate portions of bottomland hardwood sites identified for preservation in the TBHPP. Bon Weir is located such that construction could impact the water levels in a bottomland hardwood

site identified in the plan. Prairie Creek is not impacted by the TBHPP but it is only a small reservoir located on a tributary stream which is identified in the Texas Water Plan to serve Longview. Texas Water Plan III-5-11.

Neches Basin

"There are three potential reservoir sites identified in the Texas Water Plan for Zone 1 of the Neches River Basin: Eastex, Weches and Ponta. Texas Water Plan III-6-9. Weches and Ponta have been identified as potential water supply alternatives for TCWCID, NTMWD, and the City of Dallas. Another reservoir site that is close enough to Zone 1 to be used in the Upper Trinity Basin is the Rockland Reservoir site. Texas Water Plan III-6-9. All of these reservoir sites are potentially impacted by the TBHPP.

Rockland, Weches and Ponta would inundate bottomland hardwood sites identified for preservation in the TBHPP. The construction of Eastex could impact water levels in a bottomland hardwood site identified for preservation in the TBHPP.

"As can be seen, the need for additional water supplies will occur in the Upper Trinity Basin first. Essentially all of the water supply sources in the Upper Trinity have been developed. Future water supplies must, therefore, come from reservoir sites farther to the east which have not been developed. Two sites exist in Zone 2 of the Trinity Basin, Tehuacana and Tennessee Colony, which are capable of serving Upper Trinity basin needs. The other sites that will have to be evaluated are even further east and located in the Red River Basin, Sulphur Basin, Cypress

Basin, and the Neches Basin. The few reservoir sites located west of the Dallas/Fort Worth area are needed for use in the river basin of their location. Most of these reservoirs also are not very large and do not produce a yield of water sufficient enough to justify their construction. Reservoirs located to the west of the Metroplex do not yield as much water as east Texas reservoirs because of smaller amounts of rainfall and greater rates of evaporation. For example, rainfall decreases from east to west across Texas at a rate of about one inch for every 15 miles. Similarly, net evaporation rates vary from nearly zero on the Sabine River in far east Texas to 100 inches per year near El Paso.

"Because of the Upper Trinity Basin's distance from these potential new water

sources and the increasingly lengthy permitting and environmental assessment process required for reservoir development, it will take many years to identify the best sites and build these reservoirs and conveyance facilities. Even before the passage of state and federal environmental laws, it often takes an average of twenty years to develop a reservoir project from the beginning of planning to completion of construction.

"The following chart indicates the problem that the TBHPP is causing to water supply planning for the Upper Trinity Basin:

Reservoir sites identified by the Texas Water Plan, regional or local plans as the potential sources of additional water supply for the Upper Trinity Basin:

	Will inundate land identified for preservation by the TBHPP	Will impact land identified for preservation by the TBHPP
1)	Tehuacana (Trinity Basin) (TCWCID)	X
2)	Tennessee Colony (Trinity Basin) (TCWCID, Dallas, TRA)	X
3)	Weches (Neches Basin) (TCWCID)	X
4)	Ponta (Neches Basin) (TCWCID)	X
5)	Black Cypress (Cypress Basin) (TCWCID)	X
6)	George Parkhouse I (Sulphur Basin) (Dallas, NTMWD, TCWCID)	X
7)	George Parkhouse II (Sulphur Basin) (Dallas, NTMWD, TCWCID)	X
8)	Marvin Nichols I (Sulphur Basin) (Dallas, NTMWD, TCWCID)	X
9)	Marvin Nichols II (Sulphur Basin) (TCWCID, Dallas)	X
10)	Carl Estes (Sabine Basin) (Dallas)	X
11)	Waters Bluff (Sabine Basin) (Dallas)	X

12) Rockland (Neches Basin) (Upper Trinity Users) X

13) Bonham Red River Basin) (NTMWD) X

"The TBHPP makes it virtually impossible to plan for future water needs since there is a great deal of uncertainty over whether a project can be built. Admittedly, there were uncertainties before the TBHPP in water development planning. These types of uncertainties, however, could be addressed in the planning process. Consider that when evaluating reservoir site suitability, an engineer evaluates among other things, the topography, geology, evaporation rate, water availability, construction costs, and land acquisition costs to determine whether the reservoir will hold water, how much water it will hold and how much the reservoir will cost. The engineer also must evaluate the cost of the conveyance

facilities to the area of water use. Preliminary environmental studies are done to evaluate whether there are any insurmountable environmental problems such as endangered or threatened plants or animals and what mitigation requirements might be expected. Other costs are estimated including land acquisition for both reservoir and mitigation land, engineering, legal, and operation and maintenance. Each alternative site in the study is then compared against the other sites to come up with the most economical alternatives. It can be assumed with a reasonable degree of certainty that if a reservoir site is suitable from a water availability standpoint, has no site geology problems, and has no unmitigatable environmental problems, the reservoir will be permitted by the Texas Water Commission

and the Corps of Engineers. Since the entities building reservoirs by necessity must have the power of eminent domain, it is also a reasonable assumption that the land for the reservoir can be acquired. If the land underlying the reservoir contains natural resources such as lignite, the cost to acquire the land and the resources are estimated and if the cost of the project is high enough another site may be selected if an alternative exists.

"With the TBHPP, there can be no certainty that a reservoir site will be available when needed because until all of the permits are issued and the land for the reservoir acquired, the landowners impacted by the reservoir could donate a conservation easement to the refuge program and stop the project. If very many of the reservoir sites which have been identified

as being needed by the Upper Trinity Basin water users are conflicted by Fish and Wildlife's acceptance of conservation easements or their equivalent into the refuge system, the citizens of the Upper Trinity Basin may be in danger of not having enough water to meet their needs.

"The reason that the Upper Trinity water users, as well as other users, may be in danger of losing their future water supplies as a result of the TBHPP is that because of climate, topography, existing reservoir development, water availability, and soil conditions, there are only a limited number of reservoir sites in Texas. Reservoirs are needed, even in east Texas, because of the Texas rainfall/drought cycle which requires water to be held in storage for use when there is a demand for it but no flowing water in the stream or river.

The scarcity of reservoir sites and the number of entities that need the water in the few remaining major reservoir sites make it likely that if certain sites such as the Waters Bluff site are eliminated by the TBHPP, there will be conflicts between various entities over the remaining sites. Besides preventing an orderly development of the state's water resources, this conflict may cause reservoirs to be developed in areas which are environmentally more sensitive, may cause the development of a larger number of lower yielding reservoirs which would disrupt a larger amount of land than development of a fewer number of larger reservoirs, and will cause some entities to end up without enough water to meet their needs. It must be remembered that the reservoirs that are listed in the Water Plan which are not in

conflict with alternative reservoirs will eventually be developed. Many are even projected to be needed by the year 2030 which was the planning horizon that was picked for the Texas Water Plan.

"The TBHPP needs to be evaluated under NEPA. To not do so will jeopardize decades of planning costing millions of dollars that has been performed by the U.S. Study Commission-Texas, the Corps of Engineers (on Millican, Carl Estes, Big Pine, and Bonham reservoirs) the Bureau of Reclamation (on Big Sandy and Bedias reservoirs) the State of Texas, and the river authorities, water districts and cities of Texas. The 1984 Water Plan cost the Texas Department of Water Resources in the range of 7 to 10 million dollars over a period of three years. This does not count the money that was spent in planning in

previous state water plans or the planning that was done by the U.S. Study Commission-Texas, the Corps of Engineers, the Bureau of Reclamation, and the river authorities, water districts and cities which plans were relied upon by the Department of Water Resources in their work.

"If the Fish and Wildlife Service had complied with NEPA prior to issuance of the TBHPP, the state water planners would have been able to identify which sites the Fish & Wildlife Services intends to accept into the refuge system and which sites would not be accepted. Furthermore, the Fish and Wildlife Service would have had to state the position it intends to take on upstream reservoir development and the maintenance of flows through sites accepted into the refuge program downstream of that development. The answers to these issues

would allow Texas water resource planning to proceed. Additionally, the Fish and Wildlife Service, in complying with NEPA, would have had to balance the need for bottomland hardwoods versus the need for human water supply. The Fish and Wildlife Service would also have had to consider alternatives to preempting too many of Texas' few remaining reservoir sites.

There are several alternatives available to preempting 27 Texas' reservoir sites which would supply over 70% of the State's future water supply. One alternative is protection of bottomland in conjunction with reservoir mitigation. In order to receive a permit to construct a reservoir today, the Corps of Engineers and the Texas Water Commission requires mitigation of the land that will be impacted by the construction of the reservoir. For

example, the Corps of Engineers required Colorado Municipal Water District to acquire approximately 4000 acres for its Stacy reservoir. No bottomland was required because there was no bottomland impacted. The Corps of Engineers also recommends that the San Antonio Water Board acquire 1748 acres of which 1319 acres is to be riparian land (bottomland). The Texas Water Commission required the City of Stephenville, Glen Rose, and Somervell County to acquire 1700 acres of land of which at least 600 acres had to be bottomland hardwoods for their Paluxy reservoir. The Texas Water Commission also required the LCUD to acquire 12,000 acres of land at least 10,000 of which must be bottomland hardwoods for its Little Cypress Reservoir.

"Another alternative could be the enhancement of the Category 5 lands or the other Categories of bottomlands to make the land provide for more wildlife. This is a proven technique and the habitat gains are ascertainable using the Fish and Wildlife Services' own computer model the Habitat Evaluation Procedure (HEP). This model allows the user to evaluate property which is to be acquired to see how much available habitat there is for various species (including ducks) and to see how much gain in habitat can be accomplished through enhancement techniques such as planting food crops, providing nesting boxes, planting trees, building greentree reservoirs and so on. The HEP model is used by the Corps of Engineers, the Texas Water Commission, the Texas Water Development Board, the Fish and Wildlife

Service, the Texas Parks and Wildlife Department, and water resource developers to estimate the habitat impacts of reservoirs and the land and management requirements to mitigate the reservoirs impact. Both of these alternative can be used together or in conjunction with other methods to balance the need for bottomland hardwoods and the need for water supply for humans.

"The environmental analysis on bottomland hardwood preservation cannot be done piecemeal. The TBHPP itself identifies that the Program's goal is to preserve as much of the bottomland hardwoods as possible in the "area of concern." This "area of concern" includes the same area that the Upper Trinity basin and others are planning to use for their future water supply. Just as the reservoir sites are

related to one another so are the bottomland hardwood sites. This programmatic or comprehensive study should be done in coordination with the federal, state, regional and local water planning entities, as well as the equivalent environmental groups. Any less of a participation by the various groups would not allow the Fish and Wildlife Service to make a reasoned and objective environmental analysis.

"it is my opinion that the TBHPP will be used by landowners and environmental groups to block reservoir projects by transferring into the refuge system land which will be inundated by the construction of a reservoir. Bottomland Hardwood sites accepted into the easement program downstream of a reservoir also could prevent reservoir development if the Fish

and Wildlife Service refused to allow changes to the natural flow through the refuge. In my opinion, the Fish and Wildlife Service's actions in accepting the Little Sandy Hunting and Fishing Club easement without regard of the importance of that site as a water supply and the cumulative effect of losing that site as a water supply establishes a dangerous precedent which will severely impair future reservoir development."

/s/
Charles E. Nemir

SWORN TO AND SUBSCRIBED before me on the 16th day of February, 1989.

/s/ Kenneth R. Wood
Notary Public in and for
The State of Texas

(Name--Typed or Printed)

(SEAL)

Date Commission Expires:

APPENDIX D

AFFIDAVIT

STATE OF TEXAS §
§
COUNTY OF TRAVIS §

BEFORE ME, the undersigned Notary Public, on this day personally appeared Gordon L. Thorn, Jr., who being by me duly sworn on his oath deposed and said that the following statements are true:

"My name is Gordon L. Thorn, Jr., and I am over 21 years of age, competent to make this affidavit, and personally acquainted with the facts herein stated.

"I am Head of the Surface Water Data Collection and Studies Unit in the Water Availability Section of the Texas Water Development Board.

"I have worked at the Texas Water Development Board for 16 years and my experience in the field of water resource

analysis, water basin modelling, and water supply allocation may be characterized as follows: I currently supervise the collection of surface water data and the performance of surface water studies. In the past, I have worked on computer models of water systems, water rights and surface water availability modelling, and bays and estuary modelling.

"My educational background includes a bachelor's and master's degree in engineering from the University of Texas at Austin. I am a Professional Engineer in the State of Texas No. 33873.

"Based on my experience in the field of water resources planning, I feel I am an expert and qualified to give my expert opinion.

"Part of my testimony is based on excerpts from "Waters for Texas: A

Comprehensive Plan for the Future, Texas Department of Water Resources, November 1984," which is included in the Administrative Record of this case. "Water for Texas" is also an official record of the Texas Water Development Board (hereinafter the "Board").

"Section 16.051 of the Texas Water Code directs the Executive Administrator of the Texas Water Development Board to prepare and maintain a comprehensive state water plan for the orderly development and management of the state's water resources in order that sufficient water will be available at a reasonable cost to further the economic development of the entire state. In addition, the Board is directed to amend and modify the plan in response to experience and changed conditions.

"The amended Texas Water Plan was adopted by the Texas Water Development Board on September 20, 1984, as the official water plan for the State of Texas. This amended water plan has been in preparation since 1981 and is the result of a planning process which included public input through 13 public meetings, interviews with community and professional leaders, a public opinion poll, and 9 public hearings.

"Volume 1 of the amended Texas Water Plan is an executive summary which sets forth planned actions and policy recommendations. Volume 2 is a technical document which provides details of current water development and use, projected future water supply and wastewater treatment needs, and potentially developable water supplies to meet future water needs in each river and coastal basin of the state.

"The planned actions and policy recommendations approved by the Board include actions to be taken by the Texas Department of Water Resources, now the Texas Water Development Board and the Texas Water Commission, and recommendations to local, state, and federal entities, and the Texas Legislature to: (1) implement actions and programs intended to address the problem of inadequate long-term water supplies in certain areas of the state, (2) increase attentions to flood protections and floodplain management at the state and local level, (3) maintain strong state involvement in protecting water quality, and (4) address problems associated with the increasing strain being placed upon local entities to cope with water supply, water quality protection,

water conservation, flood protection, and other water-related needs.

"In examining water needs for the state, the Board uses a fifty-year planning horizon. In the current water plan this planning horizon is the period from 1980 to 2030. Texas has 15 river basins and 8 coastal basins which are designated as separate planning areas for the purposes of calculating the in-basin water supplies and the fifty-year foreseeable future in-basin water requirements. Because of the wide range of hydrologic conditions and water uses within Texas river and coastal basins, each basin has been divided into areas or zones to facilitate the presentation of data and planning.

"As stated in "Water for Texas", about 64 percent of the dependable yield of Texas reservoirs is being used to meet current

needs; the remainder is committed to expanding municipal and industrial needs during the next 20 to 30 years in areas which can be served by these supplies. These uncommitted supplies, however, will not meet the projected future needs within their respective areas, with a few exceptions, and cannot meet all future needs in neighboring and more distant locations.

"Past and present planning efforts have identified approximately 65 potential major reservoir project sites. Of this total, 19 are authorized federal projects and 46 are planned state/local projects. It is estimated in "Water for Texas" that about 5.3 million acre-feet per year of additional dependable surface-water yield and capturable treated sewage return flows (4.3 million acre-feet of yield and 1.0

million acre-feet of capturable return flows) could be developed with construction of all 65 potential reservoir projects.

"The projected High and Low Series water demands and the projected water supplies in each of eight major geographic regions of the state are shown and discussed in "Water for Texas." Localized shortages and surplus supplies occur within each region, and these are discussed in more detail in Volume 2-WATER FOR TEXAS: Technical Appendix.

"Surface-water development needs were determined for each area by comparing estimates of the currently-available supplies of ground and surface water with projected future water needs given by the High Series projections. Areas identified as having projected future shortages were examined to determine if available water

resources in the local area could be used to meet the shortage. Where locally-available supplies were determined to be insufficient, more distant sources that are projected to be surplus to the future 50-year needs of the river basins in which such sources are located, were identified as potential supplies to offset these shortages. In addition to those projects determined to be needed by this allocation of water supplies to projected demands, other specific projects were identified which could be selected based upon the plans of local interests. Where local interests have indicated prior to the publication of "Water for Texas" that they would develop alternative projects, those projects are included in the proposed surface-water development plan. Projects

such as Waters Bluff are incorporated in accordance with agency guidelines.

"The surface-water allocation procedure described above resulted in the scheduling of 44 of the 65 potential major reservoir projects over the period 1990 through 2030. Many of the projects projected for construction and operation by 1990 will not likely be operational by that time; however, based on the projected water needs given by the High Series projections, these projects or their equivalent alternatives will be needed should a repetition of teh critical drought of historical record occur. The timing of construction of facilities could be delayed if population growth, growth in the economy, an dthe effects of water conservation follow more closely the Low Series estimates of future water demands. For projects scheduled

after the year 2000, this delay could be 10 to 15 years. A copy of this schedule is located in Volume 1 - WATER FOR TEXAS: A Comprehensive Plan for the Future, p. 39, Administrative Record H (Texas Water Plan).

"In spite of the additional major reservoirs proposed for the 1980-2030 period, some areas of the state are projected to have significant water shortages within the next 50 years.

"I have reviewed the report 'Texas Bottomland Hardwood Preservation Program, Final Concept Plan', U. S. Fish and Wildlife Service, May 1985. This report identifies 62 areas of buttonland hardwoods in East Texas for possible preservation as waterfowl habitat. I compared these 62 areas with the potential major reservoir sites identified in 'Water for Texas, Technical Appendix', Texas Department of

Water Resources, November 1984. As a result of that comparison, I have determined that 27 of the reservoir projects proposed in 'Water for Texas' for development to meet future water-supply needs would potentially be impacted by the acquisition of the bottomland hardwood sites by the U. S. Fish and Wildlife Service as described in the 'Final Concept Plan.' Attachment 1 is a list of those 27 reservoirs.

"Of the reservoirs listed as primary projects needed for water supply by year 2030, Cooper, Parkhouse 1, Nichols 1, Big Sandy, Carl Estes, Rockland, Tehuacana, and Wallisville would inundate portions of bottomland hardwood sites identified for preservation in the Final Concept Plan. Parkhouse II, Bon Weir, and Caldwell are located eihter just upstream of or close

enough to bottomland hardwood sites that construciton of these projects could potentially impact the water levels in these bottomland hardwood sites; i.e., streamflows through these sites and periodic inundation of these sites.

"Big Pine, Little Cypress, Weches, Tennessee Colony, and Millican are projects identified in 'Water for Texas' as alternatives which could be needed for water-supply purposes by year 2030 which, if constructed, would inundate bottomland hardwood sites identified for preservation in the Final Concept Plan. Other projects proposed as alternatives which could impact water levels in bottomland hardwood sites are Liberty Hill, Eastex, and Bedias.

"Of the reservoirs proposed in 'Water for Texas' as other potential water-supply projects which could be needed for

construction by year 2030, Black Cypress, Carthage, Ponta, and Navasota would inundate bottomland hardwood sites identified for preservation in the Final Concept Plan. The remaining reservoirs, Bonham Corps of Engineers, Pecan Bayou, Barkman Creek, and Hurricane Bayou could, if constructed, have an impact on the water levels in bottomland hardwood sites.

"Several developments have occurred since the preparation of 'Water for Texas' which affect some of these reservoirs. In 1984, the injunction on construction of Cooper was lifted and construction of the reservoir by the U. S. Army Corps of Engineers was resumed in 1985. According to information provided to me by staff of one of the local sponsors of this project, the North Texas Municipal Water District,

all lands necessary for construction of the project have been acquired.

"Due to problems with mineral deposits, the development of Carl Estes and Carthage Reservoirs have been deferred.

"In addition, local sponsors of two projects proposed as alternatives for development by year 2030, Little Cypress and Eastex, have received Texas Water Commission permits for construction. At this time, construction has not been initiated on either project."

/S/ Gordon L. Thorn, Jr.
AFFIANT

STATE OF TEXAS §

COUNTY OF TRAVIS §

Subscribed to and sworn before me by Gordon L. Thorn, Jr., on this 31st day of October 1988, to certify which witness my official hand and seal of office.

/S/ Carolyn Ahrens
Notary Public in and for the
State of Texas

CAROLYN AHRENS
Typed or Printed Name of
Notary Public

My Commission Expires: 6/17/90

ATTACHMENT 1

Texas Water Plan Reservoirs Potentially Impacted by Implementation of the Bottomland Hardwood Preservation Program of the U. S. Fish and Wildlife Service as Described in the "Final Concept Plan", May 1985

Basin	Primary Projects Needed for Water Supply by 2030	Alternative Projects to be Constructed by 2030	Other Potential Water Supply Projects
Red	None	Big Pine Liberty Hill	Bonham C. of E.* Pecan Bayou Barkman Creek
Sulphur	Cooper Parkhouse I Parkhouse II Nichols I	None	None

Cypress	None	Little Cypress	Black Cypress
Sabine	Big Sandy Carl Estes Bon Weir	None	Carthage
Neches	Rockland	Weches Eastex	Ponta
Trinity	Tehuacna Wallis-ville	Tennessee Colony Bedias	Hurrican Bayou
Brazos	Caldwell	Millican	Navasota

*C. of E. is U. S. Army Corps of Engineers

APPENDIX D

INTERROGATORY 1

SABINE RIVER AUTHORITY

V.

UNITED STATES DEPARTMENT OF THE INTERIOR,

ET AL.

FEDERAL DEFENDANTS' RESPONSE

TO PLAINTIFF'S FIRST INTERROGATORIES

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW the Federal Defendants and submit the following responses to Plaintiff's first interrogatories.

Interrogatory No. 10:

Identify all Federal, state, regional, and local governmental agencies or associations known to you which were opposed to your acquisition of the easement from the Club.

Response:

a. Federal Agencies known to be opposed to the easement:

1) U.S. Bureau of Reclamation, Department of the Interior

2) U.S. Army Corps of Engineers

b. State agencies/entities opposed to the easement:

1) Texas Water Commission

2) Texas Water Development Board

3) Sabine River Authority

4) Trinity River Authority

5) Brazos River Authority

6) Guadalupe-Blanco River Authority

c. Local agencies/entities opposed to easement:

1) Little Cypress Municipal Utility District

2) Several other local water districts

3) City of Longview

4) City of Kilgore

5) City of Gladewater

6) City of Hawkins

Interrogatory No. 12:

Describe, in as much detail as possible, the basis for your determination as to the need for, and feasibility of, Waters Bluff Reservoir and identify the person or persons performing the analysis of its necessity and feasibility for the Fish and Wildlife Service (FWS).

Response:

The initial arguments by SRA for Waters Bluff hinged on the contention that two potential projects in the Sabine Basin, Carl Estes and Carthage, are not presently feasible because of lignite coal deposits within the former and because of oil and gas and lignite activity within the boundary of the latter. However, lignite mining has occurred in the area for many years. To date, the only potential site of lignite activity in the area is the potential Yantis Project (a lignite

gasification plant and mine site in Hopkins, Woods, and Rains Counties) proposed by Phillips Coal (SRA, 1985-Update of the Master Plan). Since other coal gasification projects in east Texas and elsewhere have fallen on hard times, it would be most unlikely if this project is presently viable. It is not known if any of the proposed Carl Estes Site would be mined even if this project is implemented. Regarding the Carthage Reservoir site, three existing lignite mines are present near the area (Darco, Pirkey, and Martin Lake). Only one other potential site in the area is under consideration (the Karnack Power Plant in Harrison County). None of these projects would be affected except the Darco Mine which has been in existence since 1932.

We believe it is questionable whether Waters Bluff is needed even without these

two reservoirs. Eleven major reservoirs are located in the upper Sabine River Basin and one major reservoir, Toledo Bend, extends to the edge of the upper basin. Two authorized Federal projects (Carl Estes and Big Sandy) and two potential local projects (Carthage and Prairie Creek) are listed in the 1984 Texas Master Plan as proposed projects in the upper basin. In addition, eight major reservoirs exist in the Cypress Basin just to the north of the Sabine Basin. Two potential local projects (Little Cypress and Black Cypress) are proposed in the Cypress Basin. The Cypress Basin is mentioned because the various local entities in the Cypress Basin are planning water projects that are competing for the same customers that SRA is proposing to serve with Waters Bluff. Even if the Cypress projects are ignored as potential sources of water to the Sabine

Basin, the 1984 Texas Water Plan projects that sufficient surface water supplies will exist in the upper basin until 2030 if Big Sandy, Prairie Creek, and Carl Estes Reservoirs are constructed and water from Toledo Bend Reservoir is allocated to the Marshall area. The Water Plan states that the Corps of Engineers has estimated that lignite resources within the Carl Estes Site "could be mined by 2020 thereby allowing construction of the project before 2020." (sic - 2030). The Carthage Reservoir was not projected to be needed before 2030. The Texas Water Plan states that water needs in the Cypress Basin can be met until 2030 by existing sources except in the Marshall area where the proposed Big Sandy Reservoir and water from the existing Toledo Bend Reservoir will supply the additional needs. Little Cypress is listed as an "alternate

additional surface-water supply" and presently is in the planning and hearing stage. Little Cypress (if built) will service several cities in the Sabine Basin. Black Cypress is not projected as being needed by 2030. Major unallocated water supplies are present in several existing reservoirs, including Toledo Bend.

The analysis of the necessity and feasibility of the Waters Bluff Project was performed by Jim Neal, Bruce Halstead, Jana Nelson and David Curtis of FWS.

Interrogatory No. 26:

Identify all other tracts of land located in Texas, of which you are actively pursuing as part of the Texas Bottomland Hardwood Preservation Program.

Response:

Other bottomland hardwood areas in which the FWS has an interest in preserving are identified in the May 1984, Texas

Bottomland Hardwood Preservation Program Concept Plan.

Interrogatory No. 30

Describe any negotiations between the Federal Defendants and the Club concerning public access to the property covered by the easement.

Response:

The Club was clearly opposed to including public access in the easement document. This is common in cases involving conservation easements. The only discussion of public access which may have occurred would have been at the October 31, 1985 meeting. Since the Club was not interested in donating the right to public access, there was no negotiation.

APPENDIX D

INTERROGATORY 2

SABINE RIVER AUTHORITY

V.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

FEDERAL DEFENDANTS' RESPONSE

TO PLAINTIFF'S SECOND INTERROGATORIES

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW the Federal Defendants and submit the following responses to Plaintiff's second interrogatories.

Interrogatory No. 12:

Clarify your response to Interrogatory No. 26 of Plaintiff's First Set of Interrogatories by describing, in as much detail as possible, whether or not it is the intent of the FWS to actively pursue other tracts of land identified in the May 1984, Texas Bottomland Hardwood Preservation Program Concept Plan. What

specific actions to date has the FWS taken to pursue the acquisition of additional tracts of land identified in the May 1984, Texas Bottomland Hardwood Preservation Program Concept Plan?

Response:

The Service does intend to pursue further acquisition of lands included in the 1984 (1985) concept plan. We are presently working with other landowners who have requested anonymity. Actions taken with these willing sellers involve biological evaluations and appraisals, including timber cruises.

Interrogatory No. 15:

Clarify your response to Interrogatory No. 36 of Plaintiff's First Set of Interrogatories by describing the specific basis and authority by title, section number, paragraph number or page number, as appropriate for the international

obligations accruing to the U.S. Fish and Wildlife Service (Service) contained in the North American Waterfowl Plan, Migratory Bird Treaty Act, the Migratory Bird Conservation Act, as well as your assertion that failure to accept the Club's donation of the easement would constitute a failure to meet the Service's international obligations. Of the 250,000 acres of bottomlands in eastern Texas and southeastern Oklahoma identified in your response, describe what actions the Service has taken to meet this commitment.

Response:

The Migratory Bird Treaty Act of 1918 (16 U.S.C. 703-711; 40 Stat. 755), as amended, implemented the 1916 Convention between the United States and Great Britain (for Canada) for the protection of migratory birds, thereby establishing a Federal responsibility for protection of the

international migratory bird resource. Amendments in 1936 implemented the 1936 Convention between the United States and the United Mexican States. Public Law 93-300 (88 Stat. 190) implemented the 1973 Convention between the United States and the Government of Japan for the protection of migratory birds. Public Law 95-616 (92 Stat. 3110) in 1978 authorized the Secretary of the Interior to issue regulations to implement the Convention between the United States and the Union of Soviet Socialist Republics concerning the Convention of Migratory Birds and their environment. Under these Conventions, the United States has an international obligation to protect the migratory bird source.

The Migratory Bird Conservation Act (16 U.S.C. 715-715d, 715e, 715f-715r; 45 Stat. 1222), as amended, establishes a Migratory

Bird Conservation Commission to approve areas recommended by the Secretary of the Interior for acquisition with Migratory Bird Conservation Funds. Those acquisitions are for the protection of migratory birds, and are, therefore, in support of the United States obligation under the Migratory Bird Treaty Act.

The North American Waterfowl Management Plan was signed by Canada and the United States in 1986. This plan outlines requirements for waterfowl management in the United States and Canada, describes populations and habitat goals, and recommends actions to resolve problems of international concern. Formal discussions are how under way with Mexico. This plan is in support of the international obligations under the Migratory Bird Treaty Act.

In reference to the 250,000 acres identified for protection in eastern Texas and southeastern Oklahoma, the Service has acquired approximately 5,000 acres of bottomland hardwoods in Oklahoma, and accepted the easement on the Little Sandy Hunting & Fishing Club. We are presently studying the acquisition of two other bottomland hardwood areas of approximately 18,000 acres total in eastern Texas in addition to the two above-mentioned acquisitions.

Interrogatory No. 18:

Identify any Environmental Assessments or Environmental Impact Statements prepared pursuant to the National Environmental Policy Act (NEPA) in connection with the document which you have referred to as the May 1984, Texas Bottomland Hardwood Preservation Program (Concept Plan).

Response:

The May 1984 (actually May, 1985) Concept Plan is not an action document in itself, but rather a planning document. As such, no NEPA involvement is appropriate. Each of the bottom-land hardwood sites included in the document will be examined under NEPA if acquisition is proposed.

To date, only the Little Sandy project has been examined under the NEPA guidelines.

Interrogatory No. 26:

Justify the conservation easements offered to FWS, nationally, in the last ten years and identify for each (1) the date of the offer, (2) the date of the final FWS decision whether to accept the easement, (3) whether the easement offer was accepted, (4) whether it was offered and/or acquired as part of the Bottomland Hardwood Preservation Program, (5) the statute or

other legal basis pursuant to which the acquisition was or would have been made, (6) whether the easement, if acquired, became part of the National Wildlife Refuge System, (7) the purpose of the acquisition, if the easement was acquired, (8) the FWS region involved, (9) the state and county wherein the easement was or is located, (10) the owner(s) who offered the easement, (11) the number of acres involved in the easement, (12) the price paid for the easement, if it was acquired, (13) the duration of the easement, and (14) whether public access was or is permitted on the easement.

Response:

We object on the basis of the onerous and burdensome and irrelevant nature of the request. Over the last 10 years, the U.S. Fish and Wildlife Service has taken hundreds of easements nationwide. It would

require a massive review of files of easements taken over the past 10 years. Realty staff in six regions would have to examine every easement taken to respond to this request. For these reasons, we object.

APPENDIX D

INTERROGATORY 3

SABINE RIVER AUTHORITY

V.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

FEDERAL DEFENDANTS' SUPPLEMENTAL RESPONSE TO PLAINTIFF'S SECOND INTERROGATORIES

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW the Federal Defendants and submit the following supplemental responses to Plaintiff's second interrogatories.

Interrogatory No. 12:

Clarify your response to Interrogatory No. 26 of Plaintiff's First Set of Interrogatories by describing, in as much detail as possible, whether or not it is the intent of the FWS to actively pursue other tracts of land identified in the May 1984, Texas Bottomland Hardwood

Preservation Program Concept Plan. What specific actions to date has the FWS taken to pursue the acquisition of additional tracts of land identified in the May 1984, Texas Bottomland Hardwood Preservation Program Concept Plan.

Response:

The Federal Defendants incorporate their previous answer to Interrogatory No. 12 and would supplemental that answer with the following information. There are four landowners with whom the FWS have talked about acquisition. These four landowners are:

1. Temple-Eastex, who owns bottomland hardwood habitat in Anderson and Cherokee Counties on the Neches River;
2. Adjoining their property is land owned by Champion International, a timber company. Their land is

interspersed with Temple-Eastex land. The Trust for Public Land, a private, non-profit conservation organization is actually dealing with Champion International. The FWS is not presently a party to those discussions between the Trust for Public Land and Champion International;

3. The FWS has had informal contact with the Blount Estate on the Angelina River in Nacogdoches County;

4. The FWS has had informal contact with the Anderson Development Corporation Lands in Smith County, Texas, on the Sabine River. The Anderson lands lie adjacent to the Little Sandy Hunting and Fishing Club.

APPENDIX D-INTERROGATORY 3
Excerpt from Federal Defendants' Supplemental Response to Plaintiff's Second Interrogatories

APPENDIX D

United States Department of the Interior
Bureau of Reclamation
Southwest Region
Commerce Building, 714 S. Tyler, Suite 201
Amarillo, Texas 79101-2386

Sep 29 1986

Memorandum

To: Regional Director, Fish and Wildlife Service Albuquerque, New Mexico

From: Regional Director

Subject: Comments on the Draft Environmental Assessment and Decision Document, Proposed Land Protection, Little Sandy Hunting and Fishing Club Easement

While we did not receive the Draft Environmental Assessment and Decision Document, Proposed Land Protection, Little Sandy Hunting and Fishing Club Easement, from your office, we nevertheless feel compelled to provide comments. This

project could have serious adverse effects on the ability of the Sabine River Authority to meet the future water needs of the people within the region. The precedent set by this maneuver would be used by anti-water development groups nationwide to preempt, or at least make very difficult, future water development projects.

Section VII, Consultation and Coordination, on page 37 does not include the Sabine River Authority, Texas Water Development Board, Corps of Engineers, Bureau of Reclamation, or any of the local city and county officials. Since this nondevelopment easement could adversely impact upon these agencies and organizations, they should have been included. The Bureau has a planning study underway in the immediate area, the Texas

Big Sandy Project (TBSP). The Bureau has, for several years, coordinated the TBSP with the Fish and Wildlife Service (FWS). However, the Bureau was not aware of FWS negotiations for the easement with the Little Sandy Hunting and Fishing Club (LSHFC) until receipt of this draft environmental assessment, which, as stated earlier, did not come to us from your office. The Waters Bluff Reservoir (WBR) is one of the alternative sites we are considering in the Texas Big Sandy Project. The Sabine River Authority's March 1986 Master Plan included the WBR. Construction of the WBR would require the acquisition of the LSHFC property. Page iii of the summary and pages 9 and 34 briefly reference and dismiss the WBR. A typical statement is the one on page iii of the summary. It reads as follows:

Acquisition of an easement on the Little Sandy Hunting and Fishing Club by the FWS could affect potential water development projects in the area. However, it is difficult at this time to state definitively what the exact affect might be, since proposals for water developments are in the early planning stages.

Purposes of the WBR could include a dependable water supply to meet future area needs, flood control, hydropower, stream flow regulation, recreation, and fish and wildlife enhancement. A waterfowl management area could be developed in the upper end of WBR and made a part of the National Wildlife Refuge System.

This inclusion of the nondevelopment easement on LSHFC private property into the FWS' refuge system could irreversibly block

the construction of WBR and its associated multipurpose public benefits.

Page 34 of the draft assessment states:

> The donation of an easement on the Little Sandy Club by the FWS will affect future water development activities in the area. Any land or interest in land in the NWR System such as this proposed easement cannot be removed from refuge status without a special Act of Congress authorizing the flooding of the Little Sandy Club property.

Part 1508.7 of the Council on Environmental Quality Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, under which this assessment has been prepared, states:

"Cumulative impact" is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individual minor but collectively significant actions taking place over a period of time.

We feel that, since WBR is included in the Sabine River Authority's Master Plan and since it has been included as an alternative in the Bureau's Texas Big Sandy Project, this reservoir meets the definition of "reasonably foreseeable future action." Therefore, we feel that WBR should be made an integral part of the LSHFC assessment.

It seems unusual for the Federal Government to enter into an agreement which allows the private owners to maintain all exclusive rights and privileges and excludes the public.

As stated earlier, the construction of WBR would result in the acquisition of the private LSHFC property and placing it in public ownership. The only apparent benefit of the nondevelopment easement to the LSHFC appears to be that this perpetual easement would block the acquisition of the property by the WBR project and assure that their land would stay in private ownership by being protected by the FWS. The timing of this easement and the incorporation of WBR into the Sabine River Authority's Master Plan and the inclusion of the WBR as an alternative in the Bureau's Texas Big

Sandy Project appears to be more than coincidental.

Page II, Section II, Alternatives, identifies only two alternatives. A third alternative might be to develop one or more waterfowl refuges in conjunction with Big Sandy Reservoir and WBR. Section 4 of the Fish and Wildlife Coordination Act provides for lands which have value to the National Migratory Bird Management Program to be made available without cost to the state fish and wildlife agency or the FWS. This would allow the FWS to meet its mandate under the Migratory Bird Conservation Act of 1929 (page i of the summary).

The development of one or more refuges could provide increased improved and managed habitat for wintering mallards, breeding wood ducks, threatened American alligator, and endangered bald eagle (page

i of the summary). These refuges could also provide increased public access for bird watching and waterfowl hunting.

It is likely that more bottomland hardwoods would be acquired and placed in public ownership than presently exists on the 3,802 acres of LSHFC private lands.

There is also another "No Action" alternative. This "No Action" alternative would be to build WBR and place LSHFC private property in public ownership and develop a waterfowl refuge in the upper end of WBR. Page II, Section II.A, No Action, states:

> Under the "No Action" alternative, the DOI would not pursue protection of the proposed area. The area was purchased and has been managed primarily for its value for hunting and fishing and will continue to be secure at least

temporarily without the proposed action. However, changing circumstances (i.e., increased taxes, feasibility of economic development, change in club membership, the need for additional capital that could be obtained by logging the bottomlands, or impact of outside development/land use-changes) will probably result in loss of this land as wildlife habitat in the future. Under this alterative it is anticipated that the area covered by the proposed easement would eventually be lost.

We do not understand how the nondevelopment will stop all of these outside and inside forces from impacting upon the LSHFC.

In summary, it would seem that a dangerous precedent would be established

whereby Federal (public) funds have been, and will continue to be, expended for primarily private interest. While it can be theorized that the general public will benefit by preservation of diminishing natural habitat, we question who will benefit most--private interests or the public.

The potential impacts associated with the preclusion of future development, including water resources, have not been evaluated. As with wildlife resources habitat, suitable sites for water development projects are becoming limited. Therefore, we oppose this action until a more definitive evaluation of the future tradeoffs has been made. Inasmuch as the loss of the area as wildlife habitat is not imminent, it would appear prudent that no action be taken until water development

plans are completed. In this manner, full evaluation of the potential impacts of the proposal, as well as those of development plans, could be made. Additionally, it would also seem that there are other methods whereby the hunt club could control its own destiny without involving Federal funds and oversight, if preempting the water development project is not the primary purpose.

/s/

cc: Commissioner, Attention: 150, 700
(w/copy incoming)

Texas Representative, Austin, Texas (w/o copy)

APPENDIX D

DEPARTMENT OF THE ARMY
SOUTHWESTERN DIVISION, CORPS OF ENGINEERS
1114 COMMERCE STREET
DALLAS, TEXAS 75242

October 24, 1986

Reply to
Attention of
Planning Division

Mr. Michael Spear
Regional Director
Fish and Wildlife Service
U.S. Department of the Interior
Post Office Box 1306
Albuquerque, New Mexico 87103

Dear Mike [Mr. Spear],

After its existence was brought to our attention, we acquired a copy of the Draft Environmental Assessment and Decision Document for proposed land protection of the Little Sandy Hunting and Fishing Club. The action described and its implications concern us.

It appears to us that the action is proposed by the hunting club primarily to

protect the property from being affected by the reservoir project proposed by the Sabine River Authority and/or the Bureau of Reclamation. If this action is successful, it would likely become a precedent for other similar groups, potentially delaying and making more expensive the development of water resource development projects needed by the nation.

The Assessment notes that the water resource project might be affected, yet the Bureau of Reclamation and the Corps of Engineers, the primary agencies charged with developing these projects, were not included in your agency's coordination of this action. We consider this omission a serious oversight.

To allow for a complete review and analysis of the proposed action, we request that you furnish this office with 10 copies

of the report and hold the comment period open for 45 days after our receipt.

Sincerely,

/s/

J.B. Hilmes
Major General, U.S. Army
Division Engineer

APPENDIX D

DEPARTMENT OF THE ARMY
FORT WORTH DISTRICT CORPS OF ENGINEERS
P.O. BOX 17300
FORT WORTH, TEXAS 76102-0300

NOVEMBER 7, 1986

Reply to
Attention of:
Planning Division

Mr. Michael Spear
Regional Director, Region 2
U.S. Fish and Wildlife Service
Post Office Box 1306
Albuquerque, New Mexico 87103-1306

Dear Mr. Spear:

This letter is in regard to the Draft Environmental Assessment and Decision Document, Proposed Land Protection, Little Sandy Hunting and Fishing Club Easement, prepared by your office in July 1986. On October 27, 1986, members of my staff attended a public meeting at Tyler, Texas, and requested an extension to the comment period on this document. Subsequent

contact with ~~your~~ office indicated no action had been taken on my request.

I am forwarding the enclosed comments to ensure that the Fort Worth District's concerns are considered in this matter. I regret that coordination with the Corps of Engineers did not occur early in your planning process. Copies of the Drat EA were not received in the District until after we were informed of its existence by the Bureau of Reclamation and the Sabine River Authority.

Sincerely,

/s/

Robert E. Keenan
Lieutenant Colonel, CE
Acting District Engineer

Enclosure

APPENDIX D

Comments on the Draft Environmental Assesment [sic] and Decision Document, Proposed Land Protection, Little Sandy Hunting and Fishing Club Easement.

1. The Draft Environmental Assessment (EA) contends that without the proposed action the land in the Little Sandy Hunting and Fishing Club (LSHFC), approximately 3,800 acres, would eventually be lost to development. This contention is not supported by any detailed studies of land use and economics. As the LSHFC has owned the property for almost 100 years without even harvesting timber, it would appear unlikely that the land use would change.

2. The last paragraph on page 33 states, "Donation to FWS of an easement . . . will essentially prohibit any significant

change in land use for perpetuity. This will result in a negative impact to the local economy, since the area will not be available for development." The assumption that the land would be developed in the future is not supported by any studies.

3. Section VII, Consultation and Coordination, page 37, states that contact was made with, "Federal entities include [sic] the U.S. Forest Service and SCS." The Corps of Engineers never received a copy of the document or any of the accompanying notices of public meeting. Potential exists for this action to adversely affect water development projects nationwide. A thorough examination of all environmental, social, and economic impacts should be undertaken. This examination should include a full and open discussion with all affected Federal, State, and local

agencies and individuals. In consideration of the far reaching implications of this proposal dn the considerable interest expressed at the Public Meeting on October 27, 1986, the Fort Worth District recommends the preparation and circulation of an Environmental Impact Statement.

4. Section VIII, List of Preparers, reveals only one individual was involved in the EA. The National Environmental Policy Act, Section 102 states " . . . (2) all agencies of the Federal Government shall - (A) Utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decisionmaking which may have an impact on man's environment". Use of a single individual to prepare this document and limited coordination with other Federal,

State, and local agencies appears to fail to comply with this portion of the Act.

APPENDIX D-INTERROGATORY 3
Excerpt from Federal Defendants' Supplemental Response to Plaintiff's Second Interrogatories

Supreme Court, U.S.
FILED
JUN 25 1992
OFFICE OF THE CLERK

No. 91-1927 (3)
No. 91-1929 (2)

In The

Supreme Court of the United States

October Term, 1991

Sabine River Authority and
Texas Water Conservation Association

Petitioners

v.

United States Department of Interior, et al.

Respondents

On Petitions for Writs of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF OF RESPONDENT, LITTLE SANDY HUNTING AND FISHING CLUB, IN OPPOSITION

JOS. IRION WORSHAM
2001 Bryan Tower
Suite 3200
Dallas, TX 75201
(214)979-3000

Attorney for Respondent,
Little Sandy Hunting and Fishing Club
Counsel of Record

BEST AVAILABLE COPY

No. 91-1927
No. 91-1929

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JOS. IRION WORSHAM
2001 Bryan Tower
Suite 3200
Dallas, TX 75201
(214)979-3000

Attorney for Respondent,
Little Sandy Hunting and Fishing Club
Counsel of Record

QUESTIONS PRESENTED

1. Whether federal action in accepting a purely negative easement, which neither causes nor permits any change in the physical environment, is a major action significantly affecting the quality of the human environment, requiring the preparation of an Environmental Impact Statement.

2. Whether the FWS Preservation Program is a proposal for major federal action (rather than a general guide for future activity) of such a nature as to require an Environmental Impact Statement.

PARTIES

Although not included in the "Parties in the Court Below" section in the Sabine River Authority Petition, Little Sandy Hunting and Fishing Club, correctly listed as an "Interested Party" in the Texas Water Conservation Association Petition, was a defendant in the District Court, an appellee in the Court of Appeals, and is a respondent here. It has neither parent nor subsidiary.

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No. 91-1927
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For the Fifth Circuit

BRIEF OF RESPONDENT, LITTLE SANDY HUNTING AND FISHING CLUB, IN OPPOSITION

STATEMENT OF THE CASE

In 1986 Little Sandy Hunting and Fishing Club granted the United States of America a perpetual non-development negative easement

covering 2800 acres in Wood County, Texas. The only thrust of the easement was to preserve the land in the character then existing. It restricted the fee owner by prohibiting alteration of typography or vegetative cover, drainage of wetlands, any development, ranching or cattle operations, timber cutting or harvesting and unnecessary roads, trails or fences. It granted the Fish and Wildlife Service no affirmative rights. All FWS can do is come on the land and see that the restrictions are observed and conservation practices continued. There is no right granted to "use" the land for any purpose. The acceptance of the easement came after the preparation of an Environmental Assessment and the issuance of a Finding of No Significant Impact.

Sabine River Authority was concerned that its proposed Waters Bluff Reservoir, designed to meet water needs in the year 2030, could not be built, although at this stage there had been no

final decision to proceed, no license or permits obtained, and no funds were available. It nevertheless filed suit, contending that under NEPA an EIS was required in connection with the acceptance of the easement.

Texas Water Conservation Association was allowed to intervene and raised a new issue not introduced (but now adopted) by Sabine River Authority, namely that FWS's Concept Plan, pertaining to future acquisition of wildlife refuge sites, was major federal action requiring an EIS.

REASONS FOR DENYING THE PETITIONS

There is no express contention that there is conflict between the decision below of the Fifth Circuit and a decision of another United States Court of Appeals, nor that the court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Furthermore, the decision below is clearly correct in that it tracks leading decisions of this Court, namely:

1) Metropolitan Edison v. People against Nuclear Energy, 460 U.S. 766 (1983), in holding that federal action having no effect on the physical environment requires no EIS; and

2) Lujan v. National Wildlife Federation, 497 U.S. -- 110 S. Ct. 3177, 111 L.Ed.2d 695 (1990), in holding that Bureau of Land Management's land withdrawal review program did not require an EIS.

ARGUMENT[1]

I. THE ACCEPTANCE OF THE LITTLE SANDY EASEMENT DID NOT REQUIRE THE PREPARATION OF AN EIS

The question at the heart of this case is whether the acceptance of the Little Sandy easement was " . . . major Federal action significantly affecting the quality of the human environment . . . "

Aside from whether the action was "major" or "significant," did it affect the human environment? It gave FWS no affirmative rights to do anything; it put serious restrictions on Little Sandy. The FWS goal was to maintain everything, as far as it possibly could, as it existed -- change nothing.

Could such an easement "significantly affect the quality of the human environment?" That depends on what Congress meant by "human

---

[1]Since both Petitions present the same two issues, they will be addressed jointly in this brief.

environment." How expansive is that concept? The Supreme Court in Metropolitan Edison v. People Against Nuclear Energy, 460 U.S. 766, came to grips with this question and gave a clear answer. It said:

> "If we were to seize the word "environment" out of its context and give it the broadest possible definition, the words "adverse environmental effects" might embrace virtually any consequences of a governmental action that someone thought "adverse." But we think the context of the statute shows that Congress was talking about the physical environment -- the world around us, so to speak. NEPA was designed to promote the human welfare by alerting governmental actors to the effect of their proposed actions on the physical environment." 460 U.S. at p. 772.

and again:

> "Thus, although NEPA states its goals in sweeping terms of human health and welfare, these goals are ends that Congress has chosen to pursue by means of protecting the physical environment, 460 U.S. at p. 773, (emphasis by the Court)."

So, does the acceptance of this easement, that is designed to continue in perpetuity the character of this land, within the framework of

the easement provisions, adversely affect the physical environment? To ask the question is to answer it. So far as FWS is concerned, there will be no changes whatsoever in the environment. The land and waters conserved by the easement will continue, peaceful, serene, and undisturbed, as they have for decades. Even as to the fee owner, Little Sandy, there are serious restrictions on what it can do that might alter the condition or use of the land. And there is no change of any nature because none of the prohibited uses is going on now. In no way does the granting of the easement produce, cause, or result in a change or invasion of the environment. Literally, nothing happens or comes to pass as a consequence of the easement. The threshold requirement of a primary impact on the physical environment is missing.

The Authority and Texas Water Conservation Association (TWCA) have recognized, as they must, that an adverse effect upon the physical

environment is necessary to generate a requirement for an EIS, but they immediately shift the talk to human environment and decry the consequences that will ensue if a scarcity of water develops (meaning Waters Bluff is not built) and the economy and the people suffer from the scarcity of water.

But how is not building a reservoir an adverse effect upon the physical environment? It may be something else -- it may have other consequences, but it is not a physical change in the environment.

There is no doubt as to what Congress had in mind. Two principal sponsors of NEPA explained:

> "What is involved [in NEPA] is a congressional declaration that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence or the health of mankind: that we will not intentionally initiate actions which do irreparable damage to the air, land and water which support life on earth." 115 Cong Rec 40416 (remarks of Sen. Jackson) (emphasis supplied).

> "[W]e can now move forward to preserve and enhance our air, aquatic, and terrestrial environments . . . to carry out the policies and goals set forth in the bill to provide each citizen of this great country a healthful environment." Id. at 40924 (remarks of Rep. Dingell) (emphasis supplied).

". . . irreparable damage to air, land, and water . . . " How is the air -- or the land -- or water -- damaged by the acceptance of the easement?

Petitioners recognize that they must deal with Metropolitan Edison and manfully attempt to do so, but they constantly encounter the problem of identifying the change in physical environment, resulting from federal action, that is necessary. No matter how they twist and turn, they cannot avoid the fact that Congress, in enacting NEPA, chose to protect the human environment by monitoring the effects of changes in the physical environment.

What Petitioners seek is a different statute -- an enhanced NEPA -- a statute that Congress could have enacted but did not -- a

statute that says that any federal action that may have an effect on the human environment (even though no effect on the physical environment) requires an EIS.

Petitioners say the courts below preferred "preservation actions" to water supply. These courts did nothing of the sort. They merely followed the clear decision of this Court -- to involve NEPA, federal action must change or lead to a change in the physical environment.

It is a one-two-three analysis -- First, a federal action that, secondly, changes the physical environment, producing, thirdly, an effect on the human environment that should be evaluated.

Here the second criterion is missing. There is simply no effect on the physical environment from the acceptance of the easement.

It is this second essential that Petitioners ignore or glide over.

To give just one example -- the Authority says in its Petition (page 11):

> "The ruling below wholly excludes from NEPA, preservation actions which themselves cause no immediate changes in the physical environment. This is so, even where such actions preclude human intervention necessary to protect other important environmental interests -- such as, in this case, a plentiful clean water supply for human consumption."

The Authority sets forth the first criterion -- federal action, jumps over the "no change" requirement, and emphasizes the adverse effect on human health and welfare.

Suppose, for instance, that FWS had owned the land in question, in fee simple, from time immemorial, and the Authority sought to buy the land to build Waters Bluff/Reservoir. Would FWS have to prepare an EIS in order to decline to sell? Obviously not, yet such action would have all the dire consequences that the Petitioners say will result from acceptance of the easement. On the other hand, if FWS decided to sell to allow the building of the lake, it probably would have to prepare an EIS, to evaluate the consequences. One of the judges commented on this point in the course of the Argument before

the Fifth Circuit panel and the Court in its opinion stated:

> "Of course, when the government conveys property to, or exchanges land with, a private party that plans to develop the land, an EIS is necessary because the conveyance of property is precipitating a change in the physical complexion of the land." (SRA Appendix A, p.21a) (emphasis by the Court).

The Authority attempts to support its position by invoking the "risk" section in Metropolitan Edison. It points to the situations where leases, licenses, etc. from the federal government become subject to NEPA because they create a "risk" that subsequent action may damage the physical environment. Exactly so. Such licenses, etc. lead to constructing dams, building airports, dredging wetlands, etc. The one-two-three step is satisfied: federal action -- environmental change -- damage to air, land, or water (the human environment). That can never happen in the instant case. There can be no "risk" of

later action affecting adversely the environment because the easement permits no action.

In deciding this case, the District Court went into an extensive review of the record which had been compiled in this case. The Fifth Circuit on appeal, because the case had been decided on summary judgment motions, reviewed the record (SRA Appendix A, pp. 18a-19a) and affirmed. Now Petitioners, presenting an Appendix D of 154 pages of affidavits, interrogatory excerpts and letters ask this Court to conduct a third review of factual matter. We urge the Court to decline this request.

II. THE FWS PRESERVATION PROGRAM DOES NOT RISE TO THE STATURE OF MAJOR FEDERAL ACTION REQUIRING AN EIS

The record in this respect is very extensive and complex. Petitioners point to certain circumstances as indicating the development of plans, analysis of alternatives, and establishment of goals to such a degree as to culminate in a proposal for action that would

require NEPA review. They ignore the fact the Plan was a preliminary study, which refused to specify sites to acquire, and left open a wide avenue of approaches to accomplish its goal of preserving bottomland habitat. It refers to the infancy of the program and the future preparation of a detailed preservation plan.

Furthermore, the very nature of the Program assumes that acquisition of conservation easements and titles will not lead to changes in the environment and thus involve NEPA. TWCA in its brief (p. 19) refers to the Program as ". . . a program of Federal acquisition for perpetual nondevelopment of water resource areas . . ." (emphasis supplied).

Finally, we deal here with a situation where the district judge has carefully reviewed the extensive record and concluded that ". . . the Court finds the Preservation Program is not a 'proposal' for major federal action under NEPA." (SRA Appendix A, p. 50a).

The Court of Appeals has affirmed, saying:

"the district court correctly dismissed the claims brought by the Sabine River Authority and the Texas Water Conservation Association and we are hard-pressed to improve upon its scholarly work." (SRA Appendix A, p. 3a).

The holding below on the factual analysis of the situation brings us within the ambit of this Court's recent opinion in Lujan v. National Wildlife Federation, 497 U.S. ____. There the question was whether a land withdrawal review program was "agency action" within the meaning of the Act. The court said (111 L.Ed.2d at p. 717):

"It is impossible that the affidavits would suffice, as the Court of Appeals held, to enable respondent to challenge the entirety of petitioners' so-called "land withdrawal review program." This is not an "agency action" within the meaning of §702, much less a "final agency action" within the meaning of §704. The term "land withdrawal review program" (which as far as we know is not derived from any authoritative text) does not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations. It is simply the name by which petitioners have occasionally referred to the continuing (and thus constantly

> changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans as required by the FLPMA. It is no more an identifiable "agency action" -- much less a "final agency action" -- than a "weapons procurement program" of the Department of Defense or a "drug interdiction program" of the Drug Enforcement Administration. As the District Court explained, the "land withdrawal review program" extends to, currently at least, "1250 or so individual classification terminations and withdrawal revocations. 699 F.Supp., at 332."

In brief, the Program is not ripe for NEPA-EIS consideration. Again, we urge the Court to decline the opportunity to examine a factually complex record, already fully reviewed below.

CONCLUSION

For the reasons stated, we urge denial of the Petitions.

Respectfully submitted,

JOS. IRION WORSHAM
2001 Bryan Tower
Suite 3200
Dallas, TX 75201
(214)979-3000

Attorney for Respondent,
Little Sandy Hunting
and Fishing Club
Counsel of Record

Supreme Court, U.S.
FILED
AUG 3 1992
OFFICE OF THE CLERK

Nos. 91-1927 and 91-1929

In the Supreme Court of the United States

OCTOBER TERM, 1992

TEXAS WATER CONSERVATION ASSOCIATION, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

SABINE RIVER AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

KENNETH W. STARR
Solicitor General
VICKI A. O'MEARA
Acting Assistant Attorney General
ROBERT L. KLARQUIST
LISA K. HEMMER
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether an environmental assessment prepared by the United States Fish and Wildlife Service in conjunction with its decision to accept a donated non-development easement to preserve a bottomland hardwood waterfowl habitat properly concluded that a full environmental impact statement was not required because the acceptance of an easement to preserve the existing physical environment would not "significantly affec[t] the quality of the human environment" within the meaning of Section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C).

2. Whether documents generally identifying regional bottomland hardwood sites and outlining possible methods for their preservation constituted "proposals for * * * major Federal actions" subject to the environmental impact assessment provisions of Section 102(2)(C) of the Act.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1927

TEXAS WATER CONSERVATION ASSOCIATION, PETITIONER

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No. 91-1929

SABINE RIVER AUTHORITY, PETITIONER

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (SRA Pet. App. 1a-23a) is reported at 951 F.2d 669. The opinion of the district court (SRA Pet. App. 24a-54a) is reported at 745 F. Supp. 388.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1992. A petition for rehearing was denied on

March 4, 1992 (SRA Pet. App. 55a-56a). The petition for a writ of certiorari was filed on June 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, requires that every federal agency include a detailed statement of environmental consequences (known as an environmental impact statement or EIS) "in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(C); SRA Pet. App. 58a-59a. The agency's responsibility to prepare an EIS is keyed to its making a "recommendation or report" on an actual "*proposal* for federal action," not merely "the contemplation of a project and the accompanying study thereof." *Kleppe* v. *Sierra Club*, 427 U.S. 390, 406 (1976) (emphasis in original), quoting *Aberdeen & Rockfish R.R.* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 422 U.S. 289, 320 (1975).

Because it is not always clear from the start whether a proposed federal action will "significantly affec[t] the quality of the human environment" within the meaning of the statute, the Council on Environmental Quality established by NEPA (42 U.S.C. 4341 *et seq.*) has issued regulations (40 C.F.R. 1500.1 *et seq.*) under which an agency may first prepare an "environmental assessment," a "concise" document that will "[b]riefly provide sufficient evidence and analysis for determining whether to prepare" an EIS and "[a]id an agency's compliance with [NEPA] when no [EIS] is necessary." 40 C.F.R. 1501.4(b), 1508.9; see SRA Pet. App. 88a. If, based on the environmental assessment, the agency determines that a full EIS is not required, it will issue a "finding of no

significant impact" (FONSI) to that effect. 40 C.F.R. 1501.4(e).

2. a. Congress has directed the Secretary of the Interior to acquire interests in wetlands in order to conserve migratory waterfowl. See, *e.g.*, Migratory Bird Conservation Act, ch. 257, 45 Stat. 1222, 16 U.S.C. 715 *et seq.*; National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. 668dd-668ee; Migratory Bird Hunting Stamp Act, ch. 71, 48 Stat. 452, 16 U.S.C. 718 *et seq.*; Emergency Wetlands Resources Act of 1986, Pub. L. No. 99-645, 100 Stat. 3582, 16 U.S.C. 3901 *et seq.* See generally *North Dakota* v. *United States*, 460 U.S. 300 (1983). Lands acquired pursuant to these directives are administered by the United States Fish and Wildlife Service (FWS) as components of the National Wildlife Refuge System. 16 U.S.C. 668dd.

The FWS has implemented a Migratory Bird Program that includes the preparation of regional studies describing and identifying migratory bird habitats. In 1983, an FWS biological survey identified as particularly valuable waterfowl habitats certain bottomland hardwood areas in eastern Texas, including land owned by the private Little Sandy Hunting and Fishing Club (Club) (SRA Pet. App. 41a; A.R. Item A, Sec. IV, at 1-6). The FWS compiled the survey results and other available information into a document (A.R. Item B) titled "Concept Plan: Texas Bottomland Hardwood Preservation Program Plan," issued in final form in May 1985.

The Concept Plan was intended to "identify and seek methods for preserving" bottomland sites (A.R. Item B, at 4), but noted that "[a] stated acreage and policy objective for bottomlands in Texas is very difficult because of the infancy of the program and complexity of biological and sociological factors involved." *Id.* at 20. It ranked identified sites into six preliminary priority categories, the highest of which included the Middle Sabine River

Bottom where the Club lands are located, *id.* at 23, but stated that "[n]o specific sites are presently targeted for action, and additional sites may be added to the list at a future date." *Id.* at 11. At the time, "[a] minimal amount of landowner information ha[d] been acquired." *Id.* at 22.

In January 1986 the FWS issued a regional "Land Protection Plan" (LPP) covering bottomland hardwoods in Texas and Oklahoma. A.R. Item C. The LPP stated that the FWS "propose[d] to identify the minimum level of protection necessary to preserve as much as possible of the remaining high quality bottomland habitat," and reviewed "a combination of alternative actions" to that end. *Id.* at 1-2. It projected a goal of preserving some 250,000 acres identified as important habitat in the two States, but did not speculate as to which sites would be protected. *Id.* at 5-6.

b. Section 16.051 of the Texas Water Code directs state agencies to prepare comprehensive water plans for the development and management of the State's water resources. Tex. Water Code Ann. § 16.051 (Vernon 1988). In 1984, the Texas Water Development Board published a revised Texas Water Plan (TWP) (A.R. Item H) setting forth water planning through 2030. The 1984 TWP mentioned four potential reservoirs along the Middle Sabine River, but none within the immediate area of the Club's property. The TWP projected a surplus of water in the Sabine Basin through 2030. A.R. Item H, Vol. II, at III-5-11, III-5-15 & Fig. III-5-3.

In March-April 1985, petitioner Sabine River Authority (SRA) issued a report (A.R. Item N) extending its own "master plan" through 2030. The report included a summary of preliminary design studies for a "totally new project" to build a Waters Bluff Reservoir that would, if constructed, inundate the Club's property. *Id.* at 10-1 *et seq.* In March 1986, SRA completed a preliminary feasibility study on Waters Bluff (A.R. Item M),

which recommended continued efforts to proceed with the project subject to cost and other possible (including environmental) constraints. *Id.* at 14-2, 9-8.

c. From 1982 through 1986 the FWS, the Texas Parks and Wildlife Department, the Club and others (including petitioner SRA) had discussed protection of waterfowl habitat on the Club's prime bottomland property along the Sabine River. Gov't C.A. Br. 10-11 & n.17. On August 29, 1986, the Club offered to donate a nondevelopment easement on the property to the United States for inclusion within the National Wildlife Refuge System. *Ibid.*

Faced with a proposed acquisition, on September 8, 1986, the FWS issued for comment a draft environmental assessment (A.R. Item P), tentatively concluding that no EIS was required under NEPA because the acceptance would not significantly affect the quality of the human environment. After public hearings and receipt and consideration of comments, in December 1986 the FWS issued a final environmental assessment (EA) and FONSI (A.R. Item D) and accepted the easement.

The EA discussed the potential impact of the proposed acquisition upon future water supplies, addressed SRA's preliminary plans concerning the Waters Bluff Reservoir and evaluated alternative proposals. It concluded both that elimination of the Waters Bluff site would not seriously impair the availability of water supplies for the foreseeable future and that establishing a waterfowl refuge in conjunction with the proposed Waters Bluff project was not a desirable alternative to accepting the easement. A.R. Item D, at 11-17, 20-21. It emphasized that acceptance of the easement would preserve, rather than altering or allowing future alteration of, the area's environmental characteristics. *Id.* at 44-46.

3. a. Petitioner SRA brought suit challenging the FWS's decision to accept the donated easement without

first preparing an EIS. Petitioner Texas Water Conservation Association (TWCA) intervened as a plaintiff, supporting SRA's arguments and also alleging that FWS was required to prepare an EIS with respect to the overall bottomlands preservation "program" outlined in the Concept Plan and the LPP.

The district court granted summary judgment for the defendants. The court ruled that SRA and TWCA lacked standing to maintain their NEPA claims (SRA Pet. App. 39a, 40a, 53a). The court also addressed the merits, however, and on the basis of the administrative record upheld the FONSI that accompanied the final EA. The court held that the FWS had taken an appropriately "hard look" at the environmental consequences of its actions and adequately considered the information before it, *id.* at 40a-49a, and that NEPA did not require the FWS to give further consideration to the harms alleged by petitioners (the inability to develop the Club site as a reservoir and the risk of future water shortages) because they did not follow from any "changes in the physical environment cause[d]" by the FWS's action. *Id.* at 33a.

The court likewise rejected (SRA Pet. App. 50a-52a) TWCA's claim that the preservation "program" set out in the Concept Plan required an EIS. The court found that the Concept Plan was a study and planning document, without "effects" that could be meaningfully evaluated, and thus did not constitute a "proposal" for major federal action subject to NEPA. *Id.* at 52a.

b. The court of appeals reversed the district court's decision on standing (SRA Pet. App. 7a-13a), but otherwise upheld and generally adopted (*id.* at 3a) the district court's rulings and opinion on the merits. Citing the district court's "painstaking review of the agency record" (*id.* at 19a), the court agreed that the FWS's decision not to prepare a full EIS was not arbitrary or capricious.

The court held (*id.* at 20a-22a) that preservation of the Club property would cause no physical change in the environment, and thus would have no significant environmental impact of the sort with which NEPA is concerned.

ARGUMENT

1. As the court of appeals recognized, judicial review of an agency's finding of no significant impact (*i.e.*, its determination that an EIS is not required with respect to a proposed action) is highly deferential. SRA Pet. App. 15a-18a and cases there cited; see *Marsh* v. *Oregon Natural Resources Council*, 490 U.S. 360, 375-378 & n.23 (1989). Whether the exact standard is the "arbitrary and capricious" standard applied by the court of appeals, SRA Pet. App. 16a, or the "reasonableness" standard applied by the district court, SRA Pet. App. 27a, is unimportant in this case. This Court has recognized that the difference generally "is not of great pragmatic consequence." 490 U.S. at 377 n.23. Moreover, the court of appeals explicitly held (SRA Pet. App. 17a n.2) that it would have affirmed the district court's decision even under the more demanding standard.

The district court carefully reviewed (SRA Pet. App. 40a-49a) the procedural and substantive adequacy of the FWS's environmental assessment of accepting the Club easement. It concluded that while petitioners might disagree with the FWS's decision, there was "no indication that the FWS failed to consider pertinent data in reaching its conclusion," that its review was inadequate, or that its decision was unreasonable, arbitrary or capricious.[1] *Id.* at 42a. Acknowledging the district court's

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[1] Petitioner TWCA suggests (TWCA Pet. 30) that FWS "ignored" the comments of the various federal and state agencies which expressed water supply concerns when FWS circulated the draft EA for comments. As the district court noted (SRA Pet.

"painstaking review of the agency record," the court of appeals agreed. *Id.* at 19a. Thus, two federal courts have reviewed the FWS's administrative findings and upheld its decision on the particular facts of record under a proper and essentially undisputed legal standard. The question does not merit further review.

2. Petitioner SRA's assertion (SRA Pet. 6) that the decision "creates an unprecedented blanket exemption from NEPA's mandate" is unfounded. This Court has held that NEPA does not require an EIS to address possible consequences of agency actions unless there is "a reasonably close causal relationship" between the alleged harm and a "change in the physical environment" caused by the agency action. *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 774 (1983).[2] SRA is correct (SRA Pet. 18-21) that under NEPA an agency must take account of unexpected but potential physical environmental changes (*i.e.*, environmental risks) flowing directly from its actions, such as the risk of an accident incidental to operating a nuclear power plant, 460 U.S. at 775 & n.9, but no such risk has ever been identified in this case. The risk that SRA and TWCA complain of—potential future water shortages—

App. 44a-45a), however, the FWS considered those comments and subsequently revised and expanded the final EA with a responsive discussion of the water supply situation, including the Waters Bluff project.

[2] In its attempt to distinguish *Metropolitan Edison* (SRA Pet. 14-18), SRA appears to argue that that decision somehow requires a connection between the effect of an agency action and the physical environment, without requiring a connection between the federal action and a physical environmental change. Even if this were logically possible, the Court's opinion states clearly that NEPA "was designed to promote human welfare by alerting governmental actors to the effect of their proposed actions on the physical environment" and "addresses environmental effects of federal actions." 460 U.S. at 772, 778.

would arise not from the FWS's action in accepting the preservation easement, but from completely exogenous factors (such as population increases or changes in the uses of surrounding land) and the potential inability of other authorities to take a particular action they might otherwise have taken at some point in the future.[3] See SRA Pet. App. 33a-34a. Importation of such factors into the analysis "lengthens the causal chain beyond the reach of NEPA." 460 U.S. at 775.

The courts of appeals have consistently held that NEPA does not require preparation of an EIS when an agency's action does not result in any change to the physical environment as it exists at the time of the action. *E.g.*, *Committee for Auto Responsibility* v. *Solomon*, 603 F.2d 992, 1001-1003 (D.C. Cir. 1979), cert. denied, 445 U.S. 915 (1980) (lease of existing parking lot to new manager); *Sierra Club* v. *Hassell*, 636 F.2d 1095, 1098-1099 (5th Cir. 1981) (replacement of bridge destroyed by hurricane); *Upper Snake River Chapter of Trout Unlimited* v. *Hodel*, 921 F.2d 232, 235 (9th Cir. 1990) (significant adjustment of dam flow rate as part of normal management); *Burbank Anti-Noise Group* v. *Goldschmidt*, 623 F.2d 115, 116 (9th Cir. 1980), cert. denied, 450 U.S. 965 (1981) (financial assistance to purchase existing airport).[4] Applying this principle to the facts,

[3] Where, as here, the agency's action merely maintains the environmental status quo, the ability of Congress (if not of local authorities) to address any conflicting needs that actually arise in the future is of course preserved. See SRA Pet. App. 36a; A.R. Item D, at 46, 53.

[4] Cases such as *Lockhart* v. *Kenops*, 927 F.2d 1028, 1032-1033 (8th Cir.), cert. denied, 112 S. Ct. 186 (1991) (see SRA Pet. 16 & n.10, TWCA Pet. 47 & n.15), holding that particular title transfers required preparation of an EIS, are not to the contrary. As the court of appeals pointed out (SRA Pet. App. 21a), such cases involve situations where, unlike here, title is transferred in contemplation of physical changes to the land. The cases cited by

the courts below correctly concluded (SRA Pet. App. 21a-22a, 32a-35a) that the FWS's acquisition of a preservation easement the very purpose of which was to *prevent* changes in the environmental status quo was not the sort of action that NEPA was intended to reach.

SRA contends (SRA Pet. 7-9) that the decision below conflicts with the principle of statutory neutrality enunciated by *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("NEPA itself does not mandate particular results, but simply prescribes the necessary process."). Contrary to SRA's suggestion (SRA Pet. 8), however, the court of appeals did not conclude that no EIS was required because FWS's action "as a whole [was] environmentally beneficial" or import into NEPA a blanket exception for agency actions in furtherance of "preservation interests." The court merely applied the established rule that no EIS is required where the federal action in question will not affect the existing physical environment. The court of appeals expressly noted that NEPA "does not command the agency to favor an environmentally preferable course of action, only that it make its decision to proceed with the action after tak-

petitioner TWCA (*e.g.*, TWCA Pet. 48-49, 58-59) are similarly compatible with the status quo principle. *Forelaws on Board* v. *Johnson*, 743 F.2d 677, 681-682 (9th Cir. 1985), cert. denied, 478 U.S. 1004 (1986), for example, carefully contrasted the situation where discretionary agency decisions would affect future power needs and therefore the need for resource development (EIS required) with agency decisions merely allocating or reallocating an existing, fixed supply of power (no EIS required). *Environmental Defense Fund, Inc.* v. *Andrus*, 596 F.2d 848 (9th Cir. 1979), required an EIS where changes in allocation of water from existing reservoirs involved direct and undisputed physical environmental changes (reducing "return flow" of water to rivers). *Id.* at 851; see SRA Pet. App. 34a (district court opinion).

ing a 'hard look at environmental consequences.'" SRA Pet. App. 13a, quoting *Methow Valley*, 490 U.S. at 350.[5]

The FWS and the courts below agreed in applying settled legal principles to straightforward facts. They correctly concluded that "NEPA does not require a federal agency to prepare an EIS in order 'to leave nature alone.' NEPA may require an EIS whenever a reservoir is built, but NEPA does not require preparation of an EIS whenever a reservoir is *not* built." SRA Pet. App. 19a-20a (citation omitted) (court of appeals), quoting TWCA Pet. App. A65-A66 (district court), quoting *National Ass'n of Property Owners* v. *United States*, 499 F. Supp. 1223, 1265 (D. Minn. 1980), aff'd *sub nom. Minnesota* v. *Block*, 660 F.2d 1240 (8th Cir. 1981), cert. denied, 455 U.S. 1007 (1982). That common sense conclusion requires no further review by this Court.

3. TWCA contends (TWCA Pet. 19-39) that the FWS was obligated to prepare a "programmatic" EIS in conjunction with the Concept Plan and the regional LPP. An EIS is required, however, only at "the time at which [the agency] makes a recommendation or report on a *proposal* for federal action." *Kleppe* v. *Sierra Club*, 427

[5] SRA's complaint (SRA Pet. 9-13) that the decision below will allow the FWS to proceed without consideration of water supply issues ignores the preliminary environmental assessment procedure. The EA prepared in this case considered (A.R. Item D, at 11-17) the potential impacts of the easement acquisition upon future water supplies and determined, as a factual matter, that acceptance of the easement would not have any significant impacts upon water supplies in the foreseeable future. Even if the easement would preclude the construction of a Waters Bluff Reservoir, the EA concluded (*id.* at 15-16) that foreseeable water supply demands could be readily satisfied from other existing and proposed reservoirs. The district court specifically found the EA's consideration of this question to be fully adequate. SRA Pet. App. 42a. The court of appeals endorsed (*id.* at 22a) the district court's finding.

U.S. at 406 (emphasis in original), quoting *Aberdeen & Rockfish R.R.*, 422 U.S. at 320. The Council on Environmental Quality's regulations state in relevant part that a "proposal"

> exists at that stage in the development of an action when an agency subject to [NEPA] has a goal *and is actively preparing to make a decision on one or more alternative means of accomplishing that goal* and the effects can be meaningfully evaluated.

40 C.F.R. 1508.23 (SRA Pet. App. 92a-93a) (emphasis added). Neither the Concept Plan nor the LPP met this definition.

The district court (SRA Pet. App. 50a) expressly applied Section 1508.23 and concluded that the Concept Plan did not constitute a "proposal." The court found (*ibid.*) that "a plain reading of the Concept Plan demonstrates that it is nothing more than a preliminary study document that the FWS intends to use as a basis for making specific proposals for land acquisitions in the future." The court then stated:

> The FWS's guidelines concerning land acquisitions explain that a concept plan such as the one prepared for the Preservation Program is only a preliminary step in the FWS's decision making process concerning land acquisitions. * * * Even after a concept plan is prepared, land acquisitions may be rejected after the FWS conducts further study and planning. It is only after such further study and planning that the FWS prepares a "decision document" concerning a specific proposal for land acquisition, and the guidelines provide that such decision documents shall be prepared in accordance with NEPA. Thus, the Preservation Program Concept Plan is not a "proposal" under NEPA, and the statements con-

tained in the Preservation Program Concept Plan support this conclusion.

SRA Pet. App. 51a (citations omitted).

TWCA disputes (TWCA Pet. 24-32) the district court's weighing of the evidence, but the court clearly had adequate grounds in the record for its finding that the Concept Plan did not constitute a "proposal" for the purposes of NEPA. Cf. *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. 3177, 3189-3191 (1990) (Bureau of Land Management's "land withdrawal review program" not sufficiently defined to be reviewable agency "action"). Moreover, even if the Concept Plan had constituted a "proposal," it would have been largely a proposal to acquire preservation easements of the sort at issue in this case, directed at preventing rather than causing or allowing changes in the physical environment. For the reasons discussed above, such a proposal would not have required an EIS.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

VICKI A. O'MEARA
Acting Assistant Attorney General

ROBERT L. KLARQUIST
LISA K. HEMMER
Attorneys

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No. 91-1927

IN THE

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OCTOBER TERM, 1991

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and
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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY OF PETITIONER TEXAS WATER CONSERVATION ASSOCIATION TO BRIEFS IN OPPOSITION

MICHAEL J. BOOTH *
FRANK R. BOOTH
CAROLYN AHRENS
DAVIDSON, TROILO & BOOTH, P.C.
1900 First City Centre
816 Congress Avenue
Austin, Texas 78701
(512) 478-9506
Counsel for Petitioner
Texas Water Conservation Association

* Counsel of Record

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1900 First City Centre
816 Congress Avenue
Austin, Texas 78701
(512) 478-9506
Counsel for Petitioner
Texas Water Conservation Association

* Counsel of Record

QUESTIONS PRESENTED

1. Does the United States Department of Interior, Fish and Wildlife Service's proposal and implementation of a plan of Federal acquisition for perpetual nondevelopment of water resource areas, in conflict with human water supply needs, constitute major Federal action which requires programmatic environmental review, or action which triggers the need for comprehensive review of cumulative impacts, under the National Environmental Policy Act?

2. Is Federal acquisition for perpetual nondevelopment of water resource areas, as a matter of law, excluded from the scope of review under the National Environmental Policy Act for consideration of potential impact of such acquisition on the human environment?

3. In applying its nondevelopment exception, did the Court of Appeals

improperly disregard significant indirect physical impacts of the Fish and Wildlife Service's proposal and implementation of acquisition for perpetual nondevelopment of water resource areas, which impacts include relocation of human water supply development and changed population patterns?

4. What is the proper standard of review of the Fish and Wildlife Service's threshold decision that the National Environmental Policy Act did not apply to its plan of Federal acquisition for nondevelopment of water resource areas?

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REPLY OF PETITIONER TEXAS WATER CONSERVATION ASSOCIATION TO BRIEFS IN OPPOSITION

Petitioner Texas Water Conservation Association files this reply to object to Federal respondents' and Little Sandy Hunting and Fishing Club's reformulation of the questions presented upon petition and to address arguments first raised by briefs in opposition.

STATEMENT

Texas Water Conservation Association (TWCA) petitioned this court for writ of certiorari on June 2, 1992. Little Sandy Hunting and Fishing Club (Club) filed a brief in opposition under letter dated June 25, 1992. Both the Sierra Club and the National Audubon Society, and the Solicitor General on behalf of Federal respondents requested and were granted extensions of time. Ultimately, only the Federal respondents chose to file a brief in opposition.

ARGUMENT ON REPLY TO BRIEFS IN OPPOSITION

1. RESPONDENTS' REFORMULATION OF QUESTIONS PRESENTED CHANGES THE SUBSTANCE OF THOSE QUESTIONS PRESENTED FOR REVIEW.

Respondents' reformulation of the questions presented ignores critical elements of TWCA's petition and constitutes substantive change that is impermissible under rule 15.2. S.Ct.R. 15.2 (referencing

id. 24). If accepted, these changes would deny TWCA the review it seeks.

1.1 Proposal and Implementation as Constituting Major Federal Action.

TWCA's Question No. 1 asks in part whether "*proposal and implementation* of a plan of Federal acquisition for perpetual nondevelopment of water resource areas in conflict with human water supply needs constitutes major Federal action which requires programmatic environmental review." (Emphasis added). Federal respondents strip this question of several elements necessary to fair review when they ask simply whether "documents generally identifying regional . . . sites and outlining possible methods for their preservation constituted 'proposals for *** major federal actions.'" (Fed. Question No. 1).

Federal respondents most probably refer to the Texas Bottomland Hardwood Preservation Program Plan and the Land

Protection Program (LPP) Plan, the contents of which Federal respondents also mischaracterize within their question. These "documents" expressly recommend a proposed program of definite parameters in an identified geographic region, with a specific goal to be implemented as soon as possible. The Club easement FONSI itself cites the Program Plan and LPP Plan as *reasons why* no further environmental analysis of impact on the human environment would be done before implementation. The federal value judgment between use of water resources for human supply, and use as wildlife habitat is made within these "documents". They evidence much more about the agencies' proposal than Federal respondents' question represents.[1]

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[1]With regard to the Club's argument concerning programmatic action, the Club misrepresents the holding in *Lujan v. National Wildlife Federation*, 110 S.Ct. 3177 (1990). *Lujan* considered the issue of Administrative Procedure Act standing, not the requirements of NEPA. (See Club, pp. 4, 15-16).

More importantly, a proposal for major Federal action may exist in fact even if the acting agency does not declare it so in documents. *See* 40 C.F.R. § 1508.23 (App. B-56). TWCA's question asks the Court to look at the evidence as a whole. Consider that the formulation of goals, methods, timing objectives, and decisions regarding alternatives in the Program Plan and the LPP Plan; *and* the Club easement acquisition in reliance on these documents; *and* interrogatory answers stating an intention to pursue further acquisitions *all* evidence a proposal for major Federal action under the CEQ Regulations and agency criteria. *See, e.g.*, 40 C.F.R. §§ 1508.18(b), .23(App. B-54-56); 30 AM 3.10D(2) (App. C-38-41).

Respondents have offered no reason why the Court should not consider all evidence of a proposal for Federal action. Federal respondents should not be allowed, by their narrow restatement of questions presented,

to divert the Court from these additional factors. TWC urges the Court to accept its Question No. 1 in this regard.

1.2 Cumulative Impacts Require Comprehensive Review.

Federal respondents and the Club both eviscerate TWCA's question regarding "the need for comprehensive review of cumulative impacts". (TWCA Question No. 1). A ruling in favor of TWCA on this question *does not* require a determination that the regional plan must be independently analyzed within an EIS or an EA, as respondents' restated questions assume.

Under 40 C.F.R. § 1508.7 (App. B-50) and *Fritiofson v. Alexander,* 772 F.2d 1225 (5th Cir. 1985), Federal respondents were required to consider the Club easement together with all "reasonably foreseeable" future acquisitions for nondevelopment in *either* a separate comprehensive EA *or* within a cumulative impacts analysis *in the Club EA.* If the Court finds that future

acquisitions with cumulative impacts were reasonably foreseeable at the time of the Club easement acquisition, either because of the program planning documents or in Federal respondents' answers to interrogatories expressing an intent to pursue other acquisitions, then it should answer TWCA's question in this regard affirmatively.[2] Respondents offer no reason why the question of cumulative impacts should not be considered by this Court. TWCA urges the Court to accept its Question No. 1 also in this regard, and to reject respondents' contrary questions.

1.3 Scope of NEPA Applicable to Programmatic, Cumulative and Site-specific Impacts.

TWCA's Question No. 2 reflects that the lower courts' creation of an exclusion from NEPA for perpetual nondevelopment acquisitions extends to TWCA's claims for

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[2]If the court sees a triable issue of fact, then summary judgment for Federal respondents was improper.

programmatic review, for comprehensive review of cumulative impacts, *and* as to the inadequacy of site-specific review of the Club easement acquisition. Both respondents improperly narrow this issue to apply only to the Club easement acquisition. (See Fed. Question No. 1; Club Question No. 1).

1.4 Indirect Impacts Require NEPA Compliance.

Both respondents, as did the courts below, ignore that acceptance of the Club easement for perpetual nondevelopment creates significant indirect physical impacts on the physical environment. (See TWCA Question No. 3). Indirect impacts are themselves sufficient to trigger NEPA review. *See* 40 C.F.R. § 1508.8 (App. B-51).

TWCA's uncontroverted affidavits show that proposed and implemented Federal action places additional stress on existing water supplies, and ultimately may affect

the health and safety of those dependent on such supplies; impacts planning and development of water supplies for human water needs; and creates conflicts among various governmental entities over remaining available supply sites. Where alternative supplies are available for future use, preclusion of primary sources will mandate the development of alternative supply sites, even if those sites are not the most environmentally sound or physically optimum choices. (Affidavits, App. D-87-89).

Federal respondents admit in their brief a critical fact. They state that "[e]ven if the easement would preclude the construction of a Waters Bluff Reservoir, the [EA] concluded . . . that foreseeable water supply development could be readily satisfied from other existing and proposed reservoirs." (Fed., p. 11, fn. 5).[3] To, in

[3]The Club EA also evidences the existence of cumulative impacts as it acknowledges that in the

the same brief, assert that the need to develop water supplies is an "exogenous factor" is flagrantly hypocritical. (See Fed., p. 9).

The Club simply writes indirect physical impacts out of TWCA's question. Federal respondents phrase their question to bury the issue in general verbiage. Respondents' questions refer, respectively to acceptance of "a purely negative easement, which neither causes nor permits any change in the physical environment" (Club Question No. 1) and to "an easement to preserve the existing physical environment". (Fed. Question No. 1).

Respondents offer no reason why indirect physical impacts should not be considered. Likewise, Federal respondents' brief never responds to the six pages of TWCA's petition addressed solely to the question

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Upper Sabine River Basin alone, three proposed water supply reservoirs would be located in bottomland areas ranked highest priority for protection. (EA, p. 17).

of indirect physical impacts. (Petition, pp. 55-60). That FWS, and the lower courts in this case, ignored significant indirect physical impacts to the human environment is critical to TWCA's petition. TWCA urges the Court to carefully consider and accept TWCA's Question No. 3.

1.5 Standard of Review is Uncertain.

Respondents' questions plainly omit uncertainty among the Circuit Courts as to the proper standard of review of threshold decisions that NEPA does not apply. TWCA refers the Court to pages 60-63 of its petition and urges the Court to answer TWCA's Question No. 4.

2. FEDERAL RESPONDENTS' STATEMENT CONTRARY TO PRECEDENT AMONG FEDERAL AGENCIES.

TWCA's petition points out that by performing an EA on the Club non-development easement, Federal respondents "obviously viewed acquisition of the Club nondevelopment easement as an action

requiring NEPA review." (Petition, pp. 50-51). Nevertheless, Federal respondents' brief boldly asserts that acquisition of a preservation easement to prevent changes in the environmental status quo was "not the sort of action that NEPA was intended to reach."[4] (Fed., p. 10). While this statement picks up on the lower courts' judicially created exclusion to NEPA, it is inconsistent with the Federal respondents' actions in this case and with other instances of Federal agency application of NEPA.[5] Consider the following instances of

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[4] TWCA contends, also contrary to Federal respondents, that the preservation easement was *not* intended to prevent changes in the environmental status quo as the human environment is properly considered under NEPA. The Club easement was intended to have the effect of preventing water supply development. Admin. Record, Vol. 2, Doc. No. 100-H. The human environmental status quo, that of water availability, is, in reality, changed.

[5] Federal respondents' statement in this regard also is contrary to the U.S. Department of Interior's own regulations. Even otherwise environmentally benign actions, that are categorically excluded from NEPA, are subjected to NEPA review when, among other things, the action may have controversial effects, establish a precedent for future action, or be related to other actions with individually

NEPA compliance in conservation activities by Federal agencies.

The Bureau of Land Management, Interior prepared an EIS on its California Desert Conservation Area Plan, an area identified by Congress as in need of protection. The statement served as both a programmatic EIS and as a site-specific EIS assessing the environmental impact of numerous site-specific actions. *American Motorcyclist Ass'n v. Watt*, 534 F.Supp. 923, 928 (C.D. Cal. 1981), *aff'd*, 714 F.2d 962 (9th Cir. 1983).[6] Site-specific statements, for example, were made as to

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insignificant but ultimately significant environmental effect. Department of Interior, 516 DM 2.3A (3) (Supp. App. C-42-45).

[6]Substantive NEPA issues were only tangentially addressed in *American Motorcyclist*. The District Court however, did identify several defects in the defendant agencies' actions, including "failure to evaluate inconsistencies with local government plans". 714.F.2d at p. 964. The Ninth Circuit upheld the lower court's decision that "[d]espite the plaintiffs probability of success on the merits", the equities did not warrant issuing a preliminary injunction. *Id.* The appellate court did, however, call the lower courts' negative opinion of NEPA standing into serious doubt.

designation of 75 Acres of Critical Environmental Concern (ACEC). ACEC #4, the Saline Valley in Inyo County was so designated because it was a wildlife habitat. *Id.* As reflected in *County of Del Norte v. U.S.*, 732 F.2d 1462 (9th Cir.) *cert. denied*, 105 S.Ct. 958 (1984), the Department of Interior conducted NEPA review and prepared an EIS before designating parts of five California rivers as components of the national wild and scenic river system.[7]

The point that TWCA makes by reference to these cases is that Federal agencies *do* consider Federal action for nondevelopment the "sort of action" to which NEPA applies. At the same time Federal respondents deny this in their brief, they themselves move forward under NEPA with substantially

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[7]The lower court's opinion in *County of Del Norte*, although unreported except at 11 Environmental Law Reporter 20,124, details more fully the NEPA issues brought by plaintiffs, including alleged defects as to the analysis of agency alternatives and insufficient opportunity for public comment.

similar actions, with, more importantly, similar *impacts* on the human environment. Federal respondents, for example, recently published in the Federal Register a summary of their record of decision for establishment of Stone Lakes National Wildlife Refuge in California, adopting an alternative recommended in a final EIS.

The Stone Lakes EIS was finalized after the agency "conducted seven public workshops and meetings to answer questions, disseminate information, and accept testimony on the proposed project and draft EIS." 57 Fed. Reg. 33007 (U.S. Fish and Wildlife Service, Interior 1992). (Supp. App. C-69-70). The overall goals for the refuge are outlined in the Federal Register and will not be repeated here, except to note that riverine wetlands are to be managed "in a manner consistent with" local and state objectives. *Id.* (Supp. App. C-

72).[8] The Service agreed to work cooperatively with the California Department of Water Resources to develop a voluntary memorandum of understanding regarding elements of that state's Comprehensive Water Plan. *Id.* (Supp. App. C-77-78). *Cf.* 54 Fed. Reg. 14173 (U.S. Fish and Wildlife Service, Interior 1989) (notice of intent to prepare an EIS on proposed National Wildlife Refuge near Cokeville, WY. where service required to enter into agreement with state for water use and management). (Supp. App. C-52).

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[8]The Federal Register reflects that the Stone Lakes National Wildlife Refuge "would constitute an addition to the National Wildlife Refuge System (System) and would be operated in accordance with the overall mission of the System." 57 Fed. Reg. 33007. (Supp. App. C-67). The Club easement, although made a part of the System, will not be so operated. No public access is provided. The Club retains the rights of hunting and fishing the property; over grazing and ranching; and over oil and gas exploration, drilling and production. (EA, p. A-2). Oil and gas rights are not an idle reservation as drilling has already occurred on site. (EA, p. 25). TWCA and Sabine River Authority raised contravention of the System Act in the courts below as additional justification for relief. (See TWCA Complaint submitted with Motion to Intervene, Vol. 1, Doc. 118).

It is significant that agency applied NEPA early in the Stone Lakes project planning process. The Stone Lakes EIS was finalized before negotiations with landowners began. *Id.*[9] Federal respondents' implication that action under the Texas Bottomland Hardwood Program is too uncertain to trigger NEPA because precise acquisitions were speculative or because implementation depends on negotiations with landowners is, at best, disingenuous.[10] (Fed., p. 4).

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[9] See 57 Fed. Reg. 33007 (stating that "[n]egotiations leading to potential cooperative agreements will commence immediately. The Service also proposes to initiate negotiations with potential willing sellers of fee and easements interests. The time from project approval to acquisition from any given landowner would vary depending on the willingness of the landowner in negotiating, availability of funding, and closing requirements."). (Supp. App. C-72-73).

[10] The Register notice anticipates that site-specific environmental reviews will be completed as specific habitat plans are prepared. 57 Fed. Reg. 33007 (Supp. App. C-82). This is precisely the situation presented by TWCA's claims--the need for *both* programmatic NEPA review and site-specific review of individual acquisitions under the Texas Bottomland Hardwood Program.

It also is significant that the Stone Lakes EIS recommended an alternative designed to minimize the adverse effects of acquisition, on, among other things, agriculture land conversion. Among the associated "environmental consequences" considered, were impacts that included the loss of agricultural production. 57 Fed. Reg. 20849 (U.S. Fish and Wildlife Service, Interior 1992) (availability of final EIS). (Supp. App. C-63). Obviously, Federal respondents can not genuinely consider the loss of food production, but not the loss of available water supply resources, an environmental impact cognizable under NEPA.

NEPA review of the Club easement acquisition and the above cited examples of NEPA compliance are brought to the Court's attention to demonstrate that the Federal respondents' disavowal of NEPA's scope is both inconsistent with their own actions in this case and a dangerous departure from agency practice. There is real danger that

Federal agencies will use the lower courts' blanket exception to NEPA to actually *decrease* the opportunity for public awareness and participation in Federal actions that affect the human environment.

TWCA urges this Court to consider the contradiction between agency precedent and the legal position taken by federal respondents in their brief, and by the lower courts in their reasoning, as an additional basis sufficient for granting TWCA's petition.

CONCLUSION

If Congress' passage of NEPA does not ensure that human water supplies will not be taken away or indirectly run dry by Federal action without open and adequate consideration of the human consequences, then it ensures nothing. Federal respondents avoided NEPA's "hard look" at nondevelopment acquisitions even though their actions critically impacted use of a resource as elemental to the human

environment as water supply. They now present post hoc rationalizations that such acquisitions simply do not come under NEPA, at all. Likewise, both Federal respondents and the Club seek by their statement of questions presented to hide from the issues TWCA brought to this Court by petition.

TWCA urges the Court to view Federal respondents' actions by their ultimate impact on the human environment and to answer the necessary questions as fully presented by TWCA's petition for writ of certiorari.

Respectfully submitted,

MICHAEL J. BOOTH*
FRANK R. BOOTH
CAROLYN AHRENS
DAVIDSON, TROILO & BOOTH, P.C.
1900 First City Centre
816 Congress Avenue
Austin, Texas 78701
(512) 478-9506
Counsel for Petitioner Texas Water Conservation Association

* Counsel of Record

No. 91-1927

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

TEXAS WATER CONSERVATION ASSOCIATION,
Petitioner
and
SABINE RIVER AUTHORITY

v.

U.S. DEPARTMENT OF INTERIOR, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY OF PETITIONER TEXAS WATER CONSERVATION ASSOCIATION TO BRIEFS IN OPPOSITION

MICHAEL J. BOOTH *
FRANK R. BOOTH
CAROLYN AHRENS
DAVIDSON, TROILO & BOOTH, P.C.
1900 First City Centre
816 Congress Avenue
Austin, Texas 78701
(512) 478-9506
Counsel for Petitioner
Texas Water Conservation Association

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OTHER AUTHORITIES

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SUPPLEMENTAL APPENDIX C

Department of Interior
516 DM 2.3A (3)

Departmental Manual

2.3 Whether to Prepare an EIS [1501.4].

A. Categorical Exclusions [1508.4].

(1) The following criteria will be used to determine actions to be categorically excluded from the NEPA process:

(a) The action or group of actions would have no significant effect on the quality of the human environment, and

(b) The action or group of actions would not involve unresolved conflicts concerning alternative uses of available resources.

(2) Based on the above criteria, the classes of actions listed in Appendix 1 to this Chapter are categorically excluded, Department-wide, from the NEPA process. A list of categorical exclusions specific to

bureau programs will be included in each Bureau Appendix to Chapter 6.

(3) The following exceptions apply to individual actions within categorical exclusions. Environmental assessments must be prepared for actions which may:

(a) Have significant adverse effects on public health or safety.

(b) Adversely affect such unique geographic characteristics as historic or cultural resources, park, recreation, or refuge lands, wilderness areas, wild or scenic rivers, sole or principal drinking water aquifers, prime farmlands, wetlands, floodplains, or ecologically significant or critical areas, including those listed on the Department's National Register of Natural Landmarks.

(c) Have highly controversial environmental effects.

(d) Have highly uncertain environmental effects or involve unique or unknown environmental risks.

(e) Establish a precedent for future action or represent a decision in principle about a future consideration with significant environmental effects.

(f) Be related to other actions with individually insignificant but cumulatively significant environmental effects.

(g) Adversely affect properties listed or eligible for listing in the National Register of Historic Places.

(h) Affect a species listed or proposed to be listed on the List of Endangered or Threatened Species.

(i) Threaten to violate a Federal, State, local, or tribal law or requirements imposed for the protection of the environment or which require compliance with Executive Order 11988 (Floodplain Management), Executive Order 11990

(Protection of Wetlands), or the Fish and Wildlife Coordination Act.

SUPPLEMENTAL APPENDIX C

54 Fed. Reg. 14173

Notice of Intent to Prepare EIS

Fish and Wildlife Service

Notice of Intent to Prepare an Environmental Impact Statement on a Proposed National Wildlife Refuge near Cokeville, WY

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice.

SUMMARY: This notice advises the public that the Fish and Wildlife Service (Service) intends to gather information necessary for the preparation of an Environmental Impact Statement (EIS) for a proposed National Wildlife Refuge near Cokeville, Lincoln County, Wyoming. Public meetings regarding the proposed refuge have been held in November 1987 and November 1988 and enabling legislation for refuge acquisition was passed by the Wyoming Legislature in mid-February 1989. A

supplemental meeting for preparation of the EIS may also be held if deemed necessary by the Service. This notice is being furnished as required by the National Environmental Policy Act (NEPA) Regulations (40 CFR 1501.7) to obtain suggestions and information from other agencies and the public on the scope of issues to be addressed in the EIS. Comments and participation in this scoping process are solicited.

DATES: Written comments should be received by May 8, 1989. Future notices will be provided in local news media if it is determined that a public meeting is in order.

ADDRESS: Written comments should be addressed to: Galen Buterbaugh, Regional Director, Region 6, U.S. Fish and Wildlife Service (RW), P. O. Box 25486, DFC, Denver, Colorado 80225.

FOR FURTHER INFORMATION CONTACT: David E. Janes, Wildlife Biologist, U.S. Fish and Wildlife Service (RW), P. O. Box 25486, DFC, Denver, Colorado 80225, Telephone: (303) 236-8148.

SUPPLEMENTARY INFORMATION: David E. Janes is the primary author of this document.

The Service, Department of the Interior, proposes to establish a National Wildlife Refuge in the Bear River valley immediately south of the town of Cokeville, Wyoming, for the purpose of protecting the wet meadowland/river oxbow wetland complex that exists there. The area supports excellent breeding populations of redhead ducks, sandhill cranes, Canada geese and numerous other populations of ducks, marshbirds, and shorebirds. These wetlands are the largest representative complex of this type in Wyoming and are threatened by incompatible agricultural practices,

drainage of oxbows, and potential oil and gas development.

The principal identified alternatives are:

1. No Action--Area would remain as is. No acquisition by the Service.

2. Acquisition/Management By Others--State, Bureau of Land Management, and conservation groups.

3. Protection by existing local, State and federal regulations.

4. Less-Than-Fee Acquisition--Wetland Easements and Management Agreements.

5. Fee Purchase--All lands acquired within boundary in fee title by the Service.

6. Combination of Alternatives--Preferred alternative by the Service. Would involve fee purchase of 22,961 acres in northern end of project area and 3,696 acres in wetland easements in southern end of project area.

The concept of protecting habitat on the Bear River near Cokeville, Wyoming, was first identified in 1978 by the Wyoming Game and Fish Department (Department) and the Service. The Service reviewed the area in 1980 and the Department completed a study of the area in 1984. In July 1987, the Service received the conditional support of the Wyoming Game and Fish Commission and the Lincoln County Commission to proceed with a refuge proposal.

In order to acquire lands with Migratory Bird Conservation Fund monies, it is necessary to have enabling legislation and the consent of the governor of the State in which the refuge is proposed. After a public meeting in Cokeville in November 1987, a bill to authorize the Service to purchase land for a refuge was introduced in the Wyoming Legislature. The bill was disapproved in February 1988.

In response to the Legislature and residents of the Cokeville area, the Service prepared a Development and Management Plan for the Bear Valley Wetlands Proposal. The Management Plan responded to the major questions regarding refuge development, water management, upland management, recreational use, and other issues. Concurrent with release of the Management Plan, the Service held public informational sessions in Cokeville, Evanston, Kemmerer and Casper, Wyoming, and in Randolph, Utah. A formal Public Hearing was held in Cokeville in November 1988 on the refuge proposal and Management Plan. Subsequently, legislation was again introduced in the Wyoming Legislature and was passed. The signed bill (Senate Enrolled Act No. 22) was submitted to Governor Sullivan, who supported the legislative action but did not sign the

Act. The Act became effective without signature.

The enabling legislation imposes certain stipulations on the Service in their refuge proposal. The area of consideration for protection is restricted to a 27,000-acre area on either side of the Bear River immediately south of the town of Cokeville. Acquisition would be from willing sellers only. No condemnation would be permitted except in quiet title actions. The Service must enter into an agreement with the State for water use and management.

The major impacts of the proposal that can be perceived are:

--Perpetual protection of the area for wildlife and wetland values.

--Loss of land ownership by the private sector.

--Gradual shift for community to recreation-oriented economy.

--Major expenditure of public monies for acquisition and development.

--Enhanced waterfowl and other wildlife populations.

--Increased tourism and public use benefits in Lincoln County.

--Decline in the amount of unregulated rangeland for cattle industry.

--Unified water management program for the area.

--Long-term socioeconomic impacts on the region.

The environmental review of this project will be conducted in accordance with the requirements of the NEPA of 1969, as amended (42 U.S.C. 4371 et seq.), NEPA Regulations (40 CFR 1500-1508), other appropriate federal regulations, and Service procedures for compliance with those regulations.

We estimate the draft EIS will be made available to the public by late June, 1989.

Dated: March 31, 1989.

Galen L. Buterbaugh,

Regional Director.

[FR Doc. 89-8228 Filed 4-6-89; 8:45 am]

SUPPLEMENTAL APPENDIX C

57 Fed. Reg. 20849

Availability of a Final EIS

Availability of a Final Environmental Impact Statement for the Proposed Stone Lakes National Wildlife Refuge In South Sacramento County, CA

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of availability.

SUMMARY: This notice advises the public that the Final Environmental Impact Statement (EIS) on the feasibility of establishing a National Wildlife Refuge on or near Stone Lakes in South Sacramento County, California is available for public review. In response to the major issues raised in public and agency comments, the Stone Lakes project planning team recommended changes in the proposed project to reduce social and economic impacts. These recommendations resulted in the development of an additional alternative,

the Mitigated Preferred Alternative. The Mitigated Preferred Alternative is presented and analyzed in detail in the Final EIS.

The most notable changes contained in the Mitigated Preferred Alternative are the reduction in size of the proposed Stone Lakes National Wildlife Refuge to approximately 9,000 acres of land and the establishment of a 9,000 acre "cooperative wildlife management area". These proposed revisions to the project boundary and acquisition programs significantly reduce potential impacts to agricultural practices in South Sacramento County, including the amount of prime farmland that would be taken out of production.

The Mitigated Preferred Alternative also includes measures to endure cooperation with the local vector (mosquito) control district. Major recreational boating use areas in the Delta

Meadows area have been excluded from the proposal. Other major issues that have been addressed include limitations on the use of condemnation, a commitment to avoid the reintroduction of endangered species, and the use of buffers on Service lands to avoid impacting adjacent agricultural operations. A number of other related concerns have also been included in the Final EIS.

A final decision regarding the establishment of the Stone Lakes refuge will not be made on this proposal prior to June 19, 1992. A Record of Decision will be prepared thereafter. Agencies and individuals on the EIS mailing list will receive notice of the Record of Decision.

Copies of the Executive Summer [sic] or Final EIS have been sent to all agencies and individuals who participated in the review of the Draft EIS. Copies of the full Final EIS are available for review at

several locations within the Sacramento Metropolitan area including most local public libraries.

FOR FURTHER INFORMATION CONTACT: Mr. Peter J. Jerome, U.S. Fish and Wildlife Service, Sacramento Realty Field Office, 2233 Watt Avenue, Suite 375, Sacramento, CA 95825-0509; (916)978-4420.

SUPPLEMENTARY INFORMATION: The Stone Lakes project area is a remnant of what was once a vast complex of permanently and seasonally flooded wetlands flanked by riparian forest and prairie. The native plant communities have been greatly changed by the effects of flood control and agricultural operations. Remnants of a variety of native plant communities still exist, particularly in the riparian scrubshrub zones. The needlegrass grasslands that were native to many dryer sites may now be locally extinct.

Perennial lakes, sloughs and streams cover approximately 1,500 acres. Additionally, there are thousands of acres of seasonally flooded wetlands and vernal pools. Emergent vegetation, primarily cattails and hardstem bulrush, is present around the edges of the larger lakes and widespread in the sloughs and seasonally flooded wetlands.

The area provides an important link in the Pacific Flyway. The proposed refuge provides nesting, migration, and wintering habitat for 23 species of waterfowl. Suitable habitat for more than 39 State and Federal candidate or listed species occurs within the project area, including Valley elderberry longhorn beetles, giant garter snakes, Swainson's hawks and Aleutian Canada geese.

In little more than a century, wetlands in California have diminished to approximately four percent of their

historic acreage. Wetland losses have occurred as a direct result of the agricultural, residential, commercial, and industrial development of California lands. The specific threats to the project area come from various quarters. Agricultural conversions to vineyards as well as commercial and residential development of large portions of the project area is imminent. The Sacramento metropolitan area is one of the fastest growing areas within California.

Six alternatives and a mitigated preferred action are presented in the Final EIS. Each alternative description includes refuge acquisition boundaries, acquisition programs and habitat restoration objectives. Each alternative is evaluated for its ability to achieve wildlife and resource goals for the proposed Stones Lakes National Wildlife Refuge. Those goals include the protection of a diverse

assemblage of Central Valley habitats and species, protecting and enhancing habitats for threatened and endangered species protecting and enhancing wetland habitats and adjacent agricultural lands for waterfowl, creating linkages to reduce habitat fragmentation, coordinating land acquisition and management activities with other agency and private refuge managers, providing for public environmental education and wildlife oriented public use, and managing riverain wetlands and adjacent floodplains consistent with flood control objectives.

The U.S. Fish and Wildlife Service's Mitigated Preferred Alternative recommends the establishment of a 9,000 acre national wildlife refuge and the establishment of a 9,000 acres "cooperative wildlife management area". Within the refuge, approximately 3,000 acres would be acquired in fee title, an additional 6,000 acres

would be managed through cooperative agreements with existing public land managers. Within the "cooperative wildlife management area", lands would be protected through conservation easements with private landowners.

The Mitigated Preferred Alternative would seek to preserve approximately 4,100 acres of existing natural habitats, restore 5,700 acres to natural habitat, and enhance 5,300 acres of agricultural lands to benefit wildlife by modifying current management practices. A diversity of existing natural and restored habitats will include permanent wetlands, seasonal wetlands, riparian and oak woodlands, perennial grasslands, and vernal pools.

The remaining alternatives represent various boundary configurations and programs ranging from approximately 7,500 acres to 74,000 acres. The No-Action Alternative (Alternative A) represents the

areas that would remain in public ownership without a national wildlife refuge. Alternative B reflects the minimum land acquisition alternative. The original proposed action is defined by Alternative C and the preferred alternative contained in the Draft EIS by Alternative C_1. Alternatives D and E represent refuge configurations that reflect expanded acquisition areas which include the Cosumnes River floodplain.

The Final EIS examines the environmental consequences associated with each alternative. Impacts related to the conversion of agricultural land to natural habitats include the loss of agricultural production, increased risk of drainage and seepage problems from, created wetlands to existing fields, crop depredation by wildlife, increased pest management problems, effects on flood control and water quality and potential for increased

trespass. Fiscal impacts related to refuge establishment include changes in economic activity, changes in economic development opportunities, reductions in the property tax base, and increased riskiness of agricultural investments.

Dated: April 30, 1992

Marvin L. Plenert.

Regional Director, U.S. Fish and Wildlife Service.

[FR Doc. 92-11037 Filed 5-14-92; 8;45 am]

SUPPLEMENTAL APPENDIX C

57 Fed. Reg. 33007

Notice of Record of Decision

Fish and Wildlife Service

Record of Decision for the Establishment of the Stone Lakes National Wildlife Refuge, Sacramento County, CA

AGENCY: U.S. Fish and Wildlife Service, Interior.

ACTION: Notice of decision and notice of availability of the record of decision document.

SUMMARY: This notice makes available to the public the Record of Decision (ROD) for the establishment of Stone Lakes National Wildlife Refuge (Refuge) and Cooperative Wildlife Management Area. The ROD was prepared in accordance with Council on Environmental Quality regulations, 40 CFR 1505.2. The ROD documents the decision of the U.S. Fish and Wildlife Service (Service) based on the information

contained in the Final Environmental Impact Statement (EIS) for the Refuge, which was filed with the Environmental Protection Agency on May 15, 1992. The Service has selected the Mitigated Preferred Alternatives as described in the Final EIS as the best alternative for implementing the decision to establish the Refuge. Additional clarifications regarding land protection strategies for the area around South Stone Lake have been added. Responses to individual comment letters received by the Service on the Final EIS are included in an appendix to the ROD.

ADDRESSES: To obtain a copy of the Record of Decision and appendix or for further information, contact Peter Jerome, Sacramento Realty Field Office, 2233 Watt Avenue, suite 375, Sacramento, California 95825, telephone (916) 978-4420.

SUPPLEMENTARY INFORMATION:

A. Purpose and Need for the Project

The Service proposes to acquire and/or otherwise protect lands in southwestern Sacramento County, California, for establishment of the Stone Lakes National Wildlife Refuge (Refuge) and a Cooperative Wildlife Management Area. The purpose of the project is to protect and restore native Central Valley, California, habitats and provide educational and recreational opportunities for the public. The Stone Lakes Refuge would constitute an addition to the National Wildlife Refuge System (System) and would be operated in accordance with the overall mission of the System.

Loss of wetland and riparian forest habitats in the Central Valley has contributed to steady decreases in waterfowl and other wildlife populations over the past 30 years. Substantial environmental changes over the last 50 years have also contributed to the

deterioration of fisheries production, floodwater storage, groundwater recharge, sediment control, recreational opportunities and aesthetic values in the region.

Public and agency awareness of the significance of the Stone Lakes area as an important wildlife area has been growing for over 20 years. At the same time, various Federal and State agencies and private organizations have been addressing the problem of dwindling habitat for migratory waterfowl and other wildlife in the Central Valley. The Stone Lakes area could play a major role in meeting the goal of these entities to protect, enhance, and restore associated habitats for fish and wildlife and plant communities.

B. Legislative Authorities and Funding Sources for Refuge Acquisition

The Service has specific responsibility for the welfare of migratory birds,

anadromous fish, and Federally listed endangered animals and plants. The following acts of Congress grant the Service the general authority to acquire land for refuge purposes: the Fish and Wildlife Act of 1956, the Endangered Species Act of 1973, the Emergency Wetlands Resources Act of 1986, the Migratory Bird Conservation Act, and the Migratory Bird Treaty Act. The primary sources of funding for refuge acquisition projects are the Migratory Bird Conservation Fund, Land and Water Conservation Fund, and North American Wetlands Conservation Fund.

C. Public Involvement and Environmental Review

A draft EIS was circulated for public review from May 20 to October 15, 1991. The Service conducted seven public workshops and meetings to answer questions, disseminate information, and accept testimony on the proposed project and draft

EIS. The Service received input from over 6,000 commenters. Comments were received from individuals, organizations, and public agencies. The Final EIS was filed with the Environmental Protection Agency and the Notice of Availability appeared in the Federal Register on May 15, 1992. Responses to individual comment letters received by the Service on the Final EIS are included in an appendix to this ROD.

D. Goals of Stone Lakes National Wildlife Refuge

The overall goals for the Stone Lakes National Wildlife Refuge are to:

1. Preserve, enhance, and restore a diverse assemblage of native Central Valley plant communities and their associated fish, wildlife, and plant species;

2. Preserve, enhance, and restore habitat to maintain and assist in the recovery of rare, endangered, and threatened plants and animals;

3. Preserve, enhance, and restore wetlands and adjacent agricultural lands to provide foraging and sanctuary habitat needed to achieve the distribution and population levels of migratory waterfowl and other water birds consistent with the goals and objectives of the North American Waterfowl Management Plan and Central Valley Habitat Joint Venture;

4. Create linkages between Refuge habitats and habitats on adjacent lands to reverse past impacts of habitat fragmentation on wildlife and plant species;

5. Coordinate Refuge land acquisition and management activities with other agencies and organizations and to maximize the effectiveness of Refuge contributions to regional habitat needs;

6. Provide for environmental education, interpretation, and fish and wildlife-oriented recreation in an urban

setting accessible to large populations; and

7. Manage riverine wetlands and adjacent floodplain lands in a manner consistent with local, State, and Federal flood management; sediment and erosion control; and water quality objectives.

E. U.S. Fish and Wildlife Service Land Acquisition and Protection Programs

The Service will employ land protection methods such as cooperative agreements, conservation easements, and fee title acquisition to secure the minimum interest in lands necessary to accomplish Refuge goals. Negotiations leading to potential cooperative agreements will commence immediately. The Service also proposes to initiate negotiations with potential willing sellers of fee and easement interests. The time from project approval to acquisition from any given landowner would vary depending on the willingness of

the landowner in negotiating, availability of funding, and closing requirements.

Consistent with Service policy commitments contained in the Mitigated Preferred Alternative, the Service has imposed administrative constraints on the use of eminent domain. For example, the Service will not use the power of Eminent Domain, i.e., condemnation, so long as existing or proposed agricultural land uses are consistent with the Sacramento County General Plan (1980) and its current proposed revisions (November 1990). In addition, the Service will implement eminent domain proceedings as a policy of last resort and only on a case-by-case basis which takes into account the relative compatibility of the specific land use at issue with Refuge goals.

F. Cooperative Partnerships

1. Commitments Contained in the Mitigated Preferred Alternative

During the comment period on the Final EIS, the American Farmland Trust encouraged the Service to give additional consideration to developing an innovative, cost-effective public/private alternative that would accomplish the goals of the Service and local landowners in the area of South Stone Lake. Support for the concept of a partnership between nonprofit land trust organizations and the Service is affirmed in the Mitigated Preferred Alternative contained in the Final EIS.

The Service encourages local efforts to develop land-use activities consistent with the purposes of the proposed Refuge. Within the proposed Refuge project area, the Service would seek to protect and manage sufficient acreage to accomplish Refuge goals. Lands in the project areas that are permanently protected in private ownership consistent with Refuge goals would satisfy this requirement (i.e.,

Federal acquisition would not be necessary). Important factors in determining the adequacy of protection would include commitment to and enforcement of perpetual covenants, commitment to habitat restoration and enhancement objectives, and commitment to migratory bird foraging and sanctuary requirements as described in the Final EIS.

Perpetual easements acquired through third-party interests are supported by the Services if they accomplish Service protection and management goals. Any property enrolled in such a program would not be considered part of the Refuge but, more appropriately, would be a component of a "Cooperative Wildlife Management Area" that would seek to preserve and enhance both agricultural and wildlife values.

2. Additional Commitments

In addition to commitments made by the Service in the Mitigated Preferred

Alternative, the Service will work with The American Farmland Trust, the North Delta Conservancy, and other nonprofit land trust organizations to foster a cooperative public/private partnership whose primary objectives are to preserve both agricultural and wildlife values.

A method for achieving a successful partnership would be to develop and implement the terms of a voluntary Memorandum of Understanding (MOU). An MOU could address mutually agreeable land protection measures in the South Stone Lake area and elsewhere. The Service will pursue this MOU based on the following principles:

(a) A common interest in protecting, enhancing, restoring, and managing wildlife uses in perpetuity;

(b) A common interest in protecting prime and important agricultural land for food production in perpetuity;

(c) A common interest in protecting existing open space in perpetuity;

(d) A recognized role of private landowners to accomplish both habitat preservation and enhancement goals as well as agricultural production goals;

(e) A need for ongoing cooperation, communication, and coordination among all parties;

(f) A commitment to act as good neighbors, recognizing the economic and wildlife objectives of both individual and public agency ownerships;

(g) A process to ensure that when fee title and conservation easement acquisition is desirable or necessary, a process is in place to ensure full coordination and cooperation with all potentially affected parties.

The Service agrees to work cooperatively with the California Department of Water Resources to develop a

voluntary MOU. Consistent with Refuge goals, this MOU will address appropriate elements of the Governor of California's Comprehensive Water Plan (April 1992) and associated environmental benefits.

G. Mosquito Abatement

The Service recognizes that an integrated mosquito suppression program can be developed that is consistent with the goals of the Stone Lakes Refuge. Management of water and vegetation along with appropriate biological and chemical control can effectively manage the mosquito population, while protecting Refuge resources, and ensuring the health, safety and welfare of the public.

The Service will continue to work with the Sacramento-Yolo Mosquito and Vector Control District to develop an MOU that effectively addresses the potentially adverse impacts on mosquito abatement as described in the Final EIS. The MOU will

ensure that mitigation measures described in the Final EIS will reduce these impacts to acceptable levels.

H. Basis for the Decision

The Mitigated Preferred Alternative represents a revision of the Service's Preferred Alternative (Alternative C_1) identified in the draft EIS. Under the Mitigated Preferred Alternative, the Stone Lakes Refuge would consist of an approximate 9,150-acre core area encompassing Upper and Lower Beach Lakes and North and South Stone Lakes. The Service would also support and participate in the establishment of Cooperative Wildlife Management Area approximately 9,100 acres in size.

The Mitigated Preferred Alternative incorporates Service policy commitments designed to minimize the adverse effects of Refuge protection, acquisition, and management programs on recreational use on

navigable waters, prime agricultural land conversion, farming practices, land values, and landowner's access to loans, and to ensure cooperation with the Sacramento-Yolo Mosquito and Vector Control District. Given the environmental and economic impacts and technical feasibility of the project, the Mitigated Preferred Alternative would best meet the identified goals of the proposed Refuge and the agency's statutory mission and responsibilities.

I. Alternatives Considered

Six alternatives, in addition to the Mitigated Preferred Alternative, were considered in detail in the Final EIS. These alternatives represent various programs and boundary configurations ranging from approximately 7,500 acres to 74,000 acres. The No Action Alternative represents areas that would remain in public ownership without a national

wildlife refuge. Alternative B reflects the minimum land acquisition alternative. The original proposed action is defined by Alternative C and the Preferred Alternative contained in the Draft EIS is defined by Alternative C_1. Alternatives D and E represent Refuge configurations that reflect expanded land protection areas to include the Cosumnes River floodplain.

Of the seven alternatives considered in detail, all are environmentally preferable to the No Action Alternative. Alternatives C, C_1, D, E, and the Mitigated Preferred Alternative would meet all project goals by providing moderate to very substantial environmental benefits. Alternative A would result in little or no change from existing conditions.

Several off-site alternatives were considered but rejected from detailed analysis because they did not satisfy major goals established for the Refuge. The

Stone Lakes study area is characterized by threats and conflicts from urbanization and agricultural conversions that make land protection a priority in order to secure existing habitat values.

J. Mitigation and Monitoring

Mitigation measures that would avoid or reduce adverse impacts of habitat protection, land acquisition and Refuge management are identified in the Final EIS. These measures would reduce significant and potentially significant impacts to less than significant impacts. The Service will implement these mitigation measures as Refuge lands are acquired and specific habitat restcration and Refuge development plans are prepared. Site specific environmental reviews will be completed for projects requiring additional National Environmental Policy Act compliance.

K. Conclusion

Based on review and consideration of the Final Environmental Impact Statement for Stone Lakes National Wildlife Refuge (May 1992), public comments on the EIS, and other relevant factors, I am selecting the Mitigated Preferred Alternative and the clarifications contained in this Record of Decision as the best alternative for implementing the decision to establish the Refuge. Environmental harm will be avoided or minimized through implementation of this action.

Dated: July 17, 1992

Marvin L. Plenert.

Regional Director, Region 1 U.S. Fish and Wildlife Service.

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